Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

BRIDGEPORT MUSIC, INC.; SOUTHFIELD MUSIC, INC.; WESTBOUND RECORDS, INC.; and NINE RECORDS, INC.,

Petitioners,

v.

STILL N THE WATER PUBLISHING and N-THE WATER PUBLISHING, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The protection of copyright, and uniform decisions under the Copyright Act, are paramount matters for the federal judiciary. In adopting Justice O'Connor's plurality opinion in *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 105-116 (1987), the United States Court of Appeals for the Sixth Circuit created a significant and far-reaching problem: the court ensured that a plaintiff alleging copyright infringement against music publishers and others from different states involved in the sale and distribution of an infringing composition cannot obtain relief in one legal proceeding filed in one federal forum. The court of appeals reached its decision after recognizing the court would have come to a different result if the court had followed Justice Brennan's *Asahi* analysis, and/or the decisions of other circuits. Further, the court ruled without discussion of copyright cases that examine personal jurisdiction analysis, and in so doing, created even more confusion about proper analysis in matters of personal jurisdiction.

The question presented is whether a federal court may assert personal jurisdiction over a non-resident music publisher in a copyright infringement action where the publisher licensed the use of its music composition with the intent that the song be distributed and performed nationwide, and the publisher, pursuant to its licenses, collected money only when sales of the composition occurred in the forum state.

STATEMENT PURSUANT TO RULE 29.6

None of the Petitioners have a parent company and no publicly held company owns 10% or more of the stock of any Petitioner.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

This petition concerns eleven cases filed against N-The-Water Publishing, Inc., individually and d/b/a Still N The Water Publishing ("NTW"), that were consolidated in the court of appeals, Nos. 02-5165 through 02-5175.[1]

The district court's memorandum (per Campbell, D.J.) granting respondents' motion to dismiss for lack of personal jurisdiction (Appendix ("Pet. App.") 26a-49a), is not published.

The court of appeals' opinion (per curiam, Keith, Daughtrey, Katz, D.J.) affirming in part and reversing in part (Pet. App. 2a-25a), is published at 327 F.3d 472.

STATEMENT OF JURISDICTION

The court of appeals entered its opinion on May 5, 2003, and granted petitioners' motion to stay the mandate pending the filing of this petition for a writ of certiorari on May 30, 2003. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

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1. An additional eight cases involving defendant DM Records, Inc., individually and a/s/t Bellmark Records, Nos. 02-5227 through 02-5234, were decided in Petitioners' favor by the court of appeals and are not a subject of this petition.

STATUTORY PROVISIONS INVOLVED

The relevant Tennessee long-arm statute, Tenn. Code Ann. § 20-2-214 (2003), is reprinted in the Appendix at 50a-51a.

STATEMENT OF THE CASE

Petitioners Bridgeport Music, Inc., Southfield Music, Inc., Westbound Records, Inc., and Nine Records, Inc., (collectively "Bridgeport"), are Michigan corporations engaged in music publishing, recording, and exploitation of music and sound recording copyrights. In May 2001, Bridgeport filed suit in the United States District Court for the Middle District of Tennessee in eleven cases against NTW, a Texas corporation. NTW is also a music publisher engaged in the exploitation of music composition copyrights.

Bridgeport alleged in each case that NTW published rap music works that included portions of Bridgeport's copyrighted music compositions without permission and proper compensation.[2] Bridgeport also alleged that NTW infringed Bridgeport's copyrights by issuing mechanical licenses to NTW's record label, Rap-A-Lot Records, permitting inclusion of the infringing rap music compositions on sound recordings and then distributing the infringing compositions and sound recordings in Tennessee and elsewhere. The mechanical license obligates the record label to pay the music publisher a set royalty only upon each sale of the sound recording containing the music composition.

2. The titles of the allegedly infringing works and the corresponding court of appeals case numbers are as follows: (1) No. 02-5165, Aggravated Monkeys; (2) No. 02-5166, Buddah Nature; (3) No. 02-5167, Bumbell; (4) No. 02-5168, Getos in the Mind; (5) No. 02-5169, Good Girl Gone Bad; (6) No. 02-5170, Havin' Thangs; (7) No. 02-5171, I Ain't Going Back; (8) No. 02-5172, Lettin' Em Know; (9) No. 02-5173, Straight Gangstaism; (10) No. 02-5174, Straight Madness; and (11) No. 02-5175, Two to the Head.

In each case, NTW moved to dismiss for lack of personal jurisdiction. The district court granted NTW's motions to dismiss, and the court of appeals affirmed. The Tennessee long-arm statute, Tenn. Code Ann. § 20-2-214, is interpreted as co-terminous with the limits on personal jurisdiction imposed by the due process clause; therefore, the court of appeals considered only whether exercising personal jurisdiction over NTW would comply with due process requirements. Pet. App. 8a-9a. The court of appeals considered whether Bridgeport had satisfied the three-part test set forth in *Southern Machine Co. v. Mohasco Indus., Inc.*, 401 F.2d 374, 381 (6th Cir. 1968): (1) whether NTW had purposefully availed itself of the privilege of acting in or causing a consequence in Tennessee; (2) whether the cause of action arose from NTW's activities in Tennessee; and (3) whether NTW's acts or the consequence NTW caused in Tennessee created a substantial connection with the forum state so that the exercise of jurisdiction over NTW would be reasonable. Pet. App. 9a.

The court of appeals concluded NTW had not purposefully availed itself of the privilege of acting in or causing a consequence in Tennessee and accordingly found personal jurisdiction over NTW lacking. Pet. App. 10a, 21a. The court stated the purposeful availment requirement is satisfied when the defendant's contacts with the forum state proximately result from the defendant's own actions that create a substantial connection with the forum state, and when the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being summoned into court there. Pet. App. 11a (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474-75 (1985), and *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1263 (6th Cir. 1996)). The court noted the emphasis in the purposeful

availment analysis must be on whether NTW had engaged in overt actions connecting it with the forum state of Tennessee, citing *Dean v. Motel 6 Operating L.P.*, 134 F.3d 1269, 1274 (6th Cir. 1998), but stated that the absence of physical contacts with Tennessee would not defeat the exercise of personal jurisdiction over this non-resident defendant if Bridgeport could demonstrate NTW's purposeful availment of the forum state. Pet. App. 11a-12a.

The court of appeals next observed that the parties and the district court had assumed that "this Circuit has adopted Justice O'Connor's approach to purposeful availment as articulated in *Asahi Metal Industry Company, Ltd. v. Superior Court*, 480 U.S. 102 (1987) (O'Connor, J.) (plurality op.)." Pet. App. 12a. Noting that "some appellate courts have expressly adopted one of *Asahi's* conflicting conceptions of minimum contacts via the stream of commerce, most circuits, including the Sixth Circuit, have avoided explicitly articulating a preference." Pet. App. 12a-13a (cited cases omitted). The court observed that the only published opinions in the Circuit addressing the issue in dicta expressed "a leaning toward Justice O'Connor's approach." Pet. App. 13a (citing *CompuServe*, 89 F.3d at 1265, and *Tobin v. Astra Pharm. Prods., Inc.* 993 F.2d 528, 543 (6th Cir. 1993)). Because the parties did not call upon the court of appeals to adopt one of the *Asahi* plurality opinions over another, the court of appeals recognized that it was "tempting" once again to defer commitment to any particular approach. Pet. App. 14a. Most importantly, however, the court of appeals stated:

> [U]nlike other instances in which an analysis under all three *Asahi* approaches would yield the same result, thus permitting avoiding establishing a clear rule, the facts in the instant action,

> particularly under the relaxed prima facie standard, would seem to dictate different results under the three *Asahi* plurality approaches. Therefore, instead of undertaking the time-consuming task of analyzing the facts under all three approaches, and then being left to select an approach based upon the end result, we make clear today our preference for Justice O'Connor's stream of commerce "plus" approach, for the reasons set forth in that opinion, and conduct the remainder of our analysis accordingly.

Pet. App. 14a.

Bridgeport argued below that NTW licensed its music compositions for inclusion on sound recordings with the express intent that they be distributed in every state, including Tennessee, because it is only paid upon each sale, and pointed out that the license provided for nationwide distribution. Bridgeport further contended that such sales did occur, and NTW's collection of mechanical royalties earned on the sales of sound recordings in Tennessee was sufficient to show that NTW purposefully availed itself of the forum state. Bridgeport thus asserted that NTW had a paramount financial interest in record labels selling as many records as possible that contain NTW music compositions pursuant to NTW's mechanical licenses, that NTW had no interest in limiting the exploitation of its compositions to a less-than-national market, that NTW had no objection to NTW's compositions being sold in Tennessee, and that NTW had actual knowledge Rap-A-Lot Records distributes nationally and is likely to exploit NTW's compositions throughout the entirety of the United States, including Tennessee. Pet. App. 14a-15a.

The court of appeals rejected Bridgeport's position, ruling that NTW's knowledge that record labels would likely distribute NTW's compositions nationally, along with its lack of objection to Tennessee sales, was not sufficient conduct to satisfy purposeful availment. Pet. App. 15a-16a.

Bridgeport also asserted below that the evidence showed NTW compositions on Rap-A-Lot sound recordings had been sold in Tennessee by at least two Nashville, Tennessee, retailers. The court responded, however, that Bridgeport failed to produce any evidence that NTW took action to direct the compositions to Tennessee. Pet. App. 16a. As with the mechanical licenses, the court of appeals found these contacts to be too random, fortuitous and attenuated to permit a finding of purposeful availment under the "stream of commerce plus" approach. Pet. App. 16a.

Bridgeport further contended the evidence showed that NTW engaged in advertising and marketing activities directed at Tennessee, and that Rap-A-Lot Records advertised nationally, including in Tennessee, on behalf of and to the financial benefit of NTW, on national television and radio spots and in national magazines. Bridgeport asserted that these activities required a finding of purposeful availment. Pet. App. 16a-17a.

The court of appeals disagreed. Although advertising is among the activities that can constitute purposeful availment in the Sixth Circuit, the court ruled that the record did not support a finding of purposeful availment based on a single statement of NTW's Chief Executive Officer that NTW "attempts to market nationally." Pet. App. 17a.

Next, the court of appeals rejected Bridgeport's contention that NTW's affiliation with the performing rights organizations (PROs) — the American Society of Composers, Authors, and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI") — constituted purposeful availment. Pet. App. 19a-21a. Bridgeport pointed out that NTW initially affiliated with ASCAP and BMI through their Tennessee offices; NTW licensed its entire music composition catalog to ASCAP and BMI, which in turn re-licensed the compositions for various uses to third parties; and the PROs monitor performances, collect performance royalties, and engage in enforcement functions on behalf of their members, including NTW. Pet. App. 19a.

The court ruled that the record did not show ASCAP and BMI had any affirmative duty to license or market the subject compositions specifically in Tennessee or even nationally, and the existence of NTW contracts with ASCAP and BMI alone were not enough to establish purposeful availment without a further showing of prior negotiations, contemplated future consequences, substantial contacts with the Tennessee offices of ASCAP and BMI, contract terms containing Tennessee forum or venue selection clauses or that the parties' course of dealing implicated conduct in Tennessee, other than by initial affiliation and the collection of royalties for songs performed in Tennessee. Pet. App. 19a-21a.

Finally, the court rejected Bridgeport's remaining contentions with regard to NTW's contract with Bluewater, a Tennessee corporation, to collect foreign royalties on NTW compositions, Pet. App. 18a-19a, and with regard to internet sales of sound recordings containing NTW's musical compositions. Pet. App. 21a.

REASONS FOR GRANTING THE PETITION

I. The federal courts of appeal are deeply divided on the status of the stream of commerce theory of personal jurisdiction after this Court's plurality opinions in *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987), and this Court's definitive guidance is required to resolve the question whether placement of a product or intellectual property into the stream of commerce constitutes "purposeful availment" of a forum such that a federal court may assert personal jurisdiction over a non-resident defendant without offending "traditional notions of fair play and substantial justice."

Since this Court handed down *Asahi* in 1987, on the heels of *Burger King* and *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), the courts of appeals have struggled to define the analytical contours of personal jurisdiction. A survey of circuit case law reveals the courts of appeals have failed to reach uniformity.

The First Circuit issued an opinion adopting the "stream of commerce plus" approach, but in doing so failed to mention that Justice O'Connor wrote only for a plurality of the Court. *Sawtelle v. Farrell*, 70 F.3d 1381, 1393 (1st Cir. 1995). In an earlier opinion, the court recognized the fractured nature of the *Asahi* decision, but concluded that none of the three plurality opinions undermined prior circuit law. *Boit v. Gar-Tec Prod., Inc.*, 967 F.2d 671, 682-83 (1st Cir. 1992).

The Second, Third, Ninth and Federal Circuits have declined to adopt any one of the *Asahi* opinions, but have considered the principles enunciated in them. *Kernan v. Kurz-*

Hastings, Inc., 175 F.3d 236, 244 (2d Cir. 1999) (holding facts met stricter O'Connor opinion); *Pennzoil Prod. Co. v. Colelli & Assoc., Inc.*, 149 F.3d 197, 203-07 (3d Cir. 1998) (holding facts satisfied both O'Connor and Brennan standards); *Roth v. Marquez*, 942 F.2d 617, 621-23 (9th Cir. 1991) (finding purposeful availment where contract of parties centered on forum state); *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 381-82 & n.3 (9th Cir. 1990) (noting defendant engaged in three of four types of conduct mentioned by Justice O'Connor); *Beverly Hills Fan Co. v. Royal Sovereign Corp.*, 21 F.3d 1558, 1566 (Fed. Cir. 1994) (declining to "join the debate" since plaintiff made jurisdictional showing under either version of stream of commerce theory).

The Fourth Circuit has issued opinions both implicitly applying Justice O'Connor's approach, *Lesnick v. Hollingsworth & Vose Co.*, 35 F.3d 939, 946-47 (4th Cir. 1994), and discussing the different plurality opinions in *Asahi* but declining to adopt any particular approach. *Federal Ins. Co. v. Lake Shore Inc.*, 886 F.2d 654, 658-660 (4th Cir. 1989). Moreover, in a recent internet case, the Fourth Circuit observed:

> [u]ntil the due process concepts of personal jurisdiction are reconceived and rearticulated by the Supreme Court in light of advances in technology, we are left to develop, under existing principles, the more limited circumstances when it can be deemed that an out-of-state citizen, through electronic contacts, has conceptually 'entered' the State via the Internet for jurisdictional purposes.

ALS Scan, Inc. v. Digital Serv. Consultants, Inc., 293 F.3d 707, 713 (4th Cir. 2002).

The Fifth and Seventh Circuits follow the reasoning of Justice Brennan's plurality opinion in *Asahi* because it is consistent with the stream of commerce theory previously developed in those circuits' pre-*Asahi* cases relying on *World-Wide Volkswagen*. *Ruston Gas Turbines, Inc. v. Donaldson Co.*, 9 F.3d 415, 420 (5th Cir. 1993); *Irving v. Owens-Corning Fiberglas Corp.*, 864 F.2d 383, 385-86 (5th Cir. 1989); *Dehmlow v. Austin Fireworks*, 963 F.2d 941, 946-48 (7th Cir. 1992). The Seventh Circuit's analysis in *Dehmlow* is especially insightful:

> Because the Supreme Court established the stream of commerce theory, and a majority of the Court has not yet rejected it, we consider that theory to be determinative. We may not depart from Court precedent on the basis of a belief that present Supreme Court Justices would not readily agree with past Court decisions. *Rodriguez De Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 [(1989)]. Moreover, fairness commends the application of the stream of commerce theory. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473-74 (explaining that a state has a manifest interest in providing its residents with a convenient forum for redress of injuries, that the Due Process Clause is not a territorial shield to enable defendants to avoid interstate obligations, and that modern transportation and communication have decreased the burden to a nonresident defendant in a state in which it has some economic activity).

Dehmlow, 963 F.2d at 947.

Panels of the Eighth Circuit have issued conflicting opinions, following both Justice O'Connor's "stream of commerce plus" approach, *Falkirk Mining Co. v. Japan Steel Works, Ltd.*, 906 F.2d 369, 376 (8th Cir. 1990), and Justice Brennan's "stream of commerce" approach. *Clune v. Alimak AB*, 233 F.3d 538, 542-45 (8th Cir. 2000); *Barone v. Rich Bros. Interstate Display Fireworks Co.*, 25 F.3d 610, 614-15 (8th Cir. 1994). An Eighth Circuit panel has also applied the "effects" test of *Calder v. Jones*, 465 U.S. 783 (1984), after *Asahi*. *Dakota Indus., Inc. v. Dakota Sportswear, Inc.*, 946 F.2d 1384 (8th Cir. 1991) (noting *Calder* "effects" test allows assertion of personal jurisdiction over non-resident defendant whose acts "are performed for the very purpose of having their consequences felt in the forum state.")

The Tenth and D.C. Circuits appear to be the only courts of appeal that have not issued opinions discussing *Asahi*. But even in one district court within the Tenth Circuit, the courts are split on what the law should be. *Envirotech Pumpsystems, Inc. v. Sterling Fluid Sys. (Schweiz) AG*, 2:99CV 814K, 2000 U.S. Dist. LEXIS 16942 at *22-23 (D. Utah 2000) (following Justice O'Connor's view); *DeMoss v. City Market, Inc.*, 762 F. Supp. 913, (D. Utah 1991) (following Justice Brennan's stream of commerce theory previously articulated in *World-Wide Volkswagen* and adopted by Tenth Circuit).

The Eleventh Circuit has followed Justice O'Connor's approach in one opinion, *Madara v. Hall*, 916 F.2d 1510, 1519 (11th Cir. 1990) (failing to note O'Connor opinion is plurality opinion), and held in another that the court need not choose among the *Asahi* plurality opinions because the facts of the case satisfied the more stringent analysis of Justice O'Connor. *Vermeulen v. Renault, U.S.A., Inc.*, 985 F.2d 1534, 1548 (11th Cir. 1993).

This petition presents the Court with an opportunity to revisit and define the stream of commerce theory of personal jurisdiction. The Court's guidance can resolve the circuit conflicts that perplex judges and practitioners across the nation and can bring certainty to a fundamental aspect of our jurisprudence.

II. Because the decision below effectively requires a copyright owner to pursue infringement claims against a music publisher only in the forum where the publisher resides and thereby creates the potential for sharply inconsistent results and misuse of judicial resources, this Court must intervene to restore certainty and consistency to copyright law.

The unsettled state of purposeful availment law imposes momentous difficulties upon members of the music entertainment industry, which operates increasingly on a national and international basis. The music industry fully depends upon the certainty and consistency of federal copyright law and more broadly, intellectual property law. It is critical that this Court provide clear guidance on the extent to which federal courts in copyright disputes may assert personal jurisdiction over non-resident defendants such as music publishers, record labels, and entertainment companies.

The state of Tennessee has a great interest in the music entertainment business, including the copyright infringement claims that are the subject of these legal actions. Music and entertainment occupy a central place in the Tennessee capitol's economy, such that virtually every major record label, booking agency, and song publisher in America maintains a Nashville, Tennessee, address.

The court of appeals' decision below that NTW cannot be held to answer in Tennessee because of a lack of personal jurisdiction has far-reaching and potentially devastating consequences for music composition and sound recording copyright owners. The decision requires music industry plaintiffs to establish minimum contacts with the state through some act beyond the placement of music compositions and sound recordings in the stream of commerce through licensing and promotion. Where a copyright dispute involves multiple music publishers, record labels, clearance companies, and distribution companies — a very common occurrence in the music business — the ruling potentially requires a copyright owner to file a separate legal action against each infringing entity in each distinct forum where that entity resides. Such a highly restrictive consequence is inefficient and costly, and raises exponentially the potential for inconsistent results where the same dispute must be litigated in several different federal courts.

Even Justice O'Connor recognized in her plurality opinion in *Asahi* that *World-Wide Volkswagen* admonished courts to take into consideration the interest of the several States in the efficient judicial resolution of disputes and the advancement of substantive policies. *Asahi*, 480 U.S. at 115 (O'Connor, J., plurality op.) The court of appeals' decision below has the effect of multiplying, rather than minimizing, the use of judicial resources in intellectual property cases throughout the country.

In deciding the instant cases, the court of appeals did not address, discuss, or distinguish the intellectual property cases that petitioners cited to the court, including *Keeton v. Hustler Magazine*, 465 U.S. 770 (1984); *Beverly Hills Fan Co. v. Royal Sovereign Corp.*, 21 F.3d 1558 (Fed. Cir. 1994);

Dakota Indus., Inc. v. Dakota Sportswear, Inc., 946 F.2d 1384 (8th Cir. 1991); *Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distributions*, 647 F.2d 200 (D.C. Cir. 1981); *Gray v. St. Martin's Press*, 929 F. Supp. 40 (D.N.H. 1996); *Linzer v. EMI Blackwood Music*, 904 F. Supp. 207 (S.D.N.Y. 1995); *Editorial Musical Latino Americana v. Mar Int'l Records, Inc.*, 829 F. Supp. 62 (S.D.N.Y. 1993); *Lipton v. The Nature Company*, 781 F. Supp. 1032 (S.D.N.Y. 1992), *aff'd in part, reversed in part*, 71 F.3d 464 (2d Cir. 1995); and *Triple A Partnership v. MPL Communications, Inc.*, 629 F. Supp. 1520 (D. Kan. 1986). These cases recognize that intellectual property, such as copyrighted music compositions and sound recordings, readily moves into and throughout each of the fifty states, primarily because the copyright owner wants this result and purposefully acts to achieve it by issuing licenses that expressly direct the widespread distribution of the intellectual property on a national basis to generate as much revenue as possible for the copyright owner.

a. Pre-*Asahi* music copyright cases

In the music copyright cases decided before *Asahi*, three federal district courts determined that they could exercise personal jurisdiction over parties who placed infringing musical works into the stream of commerce. For example, three brothers who co-wrote an original music composition sued a music publisher for copyright infringement in Kansas federal district court. *Triple A Partnership*, 629 F. Supp. at 1521. The defendant music publisher was a New York corporation. *Id.* The publisher received revenue from its compositions by licensing the rights to the compositions to various independent entities, none of which were located in Kansas. *Id.* The allegedly infringing composition was performed and played on radio programs in Kansas. *Id.*

The licensed entities, such as ASCAP and BMI, exploited the Kansas market, and paid royalties to the defendant publisher. *Id.* The infringing composition was also licensed for use in a movie that was shown in Kansas theatres and television broadcasts. *Id.* The publisher had a licensing agreement with the Harry Fox Agency, a New York corporation, which authorized the sale of recordings of the publisher's compositions, including the infringing work. *Id.* Some of the recordings were sold in Kansas, and the publisher received royalties from the Harry Fox Agency based on the number of recordings sold in Kansas. *Id.* The publisher also received revenue earned on the publication and sale of printed sheet music pursuant to a nationwide licensing agreement with the Hal Leonard Publishing Company. *Id.*

The district court rejected the publisher's contention that it had not transacted any business in Kansas to be subject to service of process under the long-arm statute. *Id.* at 1522. The publisher argued that it operated solely through licensing agreements with wholly independent corporations located outside of Kansas, and could not be subjected to personal jurisdiction in Kansas. *Id.* The district court noted the long-arm statute expressly provided that a non-resident defendant must submit to the jurisdiction of Kansas courts if "in person or through an agent or instrumentality" that person commits any of the acts enumerated in the statute. *Id.* The court concluded that the publisher's licensing agreements constituted the transaction of business in Kansas through "an instrumentality." *Id.*

The court next concluded that exercising jurisdiction did not offend due process principles. *Id.* at 1523-24. Relying on *World-Wide Volkswagen* and *Burger King*, the court held that the publisher purposefully availed itself of the privilege

of conducting activities within Kansas through its music licensing activities, and that the requisite minimum contacts existed to exercise jurisdiction. *Id.* Importantly, the court wrote:

> We recognize that normally the stream of commerce doctrine is applied to manufacturers of goods or component parts. But we can see no logical reason why that doctrine should be so restricted here. In fact, in the instant case, defendant has a more direct interest in the sale of its product in the forum state than does a manufacturer in a typical stream of commerce case. In most stream of commerce cases, the manufacturer sells its product to a distributor for a certain price, the sale is complete, and the distributor then takes the product into other states. The manufacturer's revenue is not directly dependent on the sale by the distributor of the product in other states. But in the instant case, defendant not only delivers its product — the allegedly infringing work — into the stream of commerce, it *directly* derives revenues from the sale of the song in Kansas by Hal Leonard and the Harry Fox Agency. For example, defendant receives no money from the sale of sheet music of the work in question until and unless Hal Leonard sells the sheet music in Kansas and other states.

Id. at 1524 (emphasis in original). The court concluded that "the defendant has purposefully conducted its activities to make its product available in as many forums as possible, including Kansas[,]" and that by delivering its song into the

stream of commerce with the expectation that it would be bought by consumers in the forum state, the music publisher had benefited from the protection of Kansas laws for its products and should reasonably anticipate being haled into court in Kansas. *Id.* at 1525.

Similarly, a Pennsylvania district court exercised personal jurisdiction in a copyright infringement case over a New York music publisher that was not qualified to do business as a corporation in Pennsylvania, did not maintain bank accounts or property in Pennsylvania, did not ship merchandise into the state, and did not have agents in the state. *Testa v. Janssen*, 482 F. Supp. 1195, 1197 (W.D. Penn. 1980). Pursuant to a licensing agreement, the publisher assigned to BMI the right to license and perform all music compositions it owned or in which it held a copyright, including the infringing song, throughout the world in return for royalties. *Id.* The alleged infringing song was played on radio stations and sold at retail outlets in western Pennsylvania. *Id.* at 1198.

The district court reasoned that, under Pennsylvania law, a foreign corporation indirectly ships merchandise into the commonwealth for purposes of the long-arm statute when it can reasonably foresee that its product would be sold to outlets around the country and Pennsylvania would be one such market. *Id.* The court concluded that the music publisher indirectly shipped the alleged infringing song and other songs into Pennsylvania through its licensee, BMI. *Id.* The court said it was of "no import" that the publisher's contract with BMI was executed outside of Pennsylvania or that the publisher did not engage in any physical acts in Pennsylvania. *Id.* Because the publisher authorized BMI to distribute songs anywhere in the United States, the publisher reasonably could

have foreseen that the song would be distributed in Pennsylvania. *Id.* As to the due process inquiry, the district court could "perceive no unfairness in requiring [the publisher] to defend this suit in Pennsylvania[,]" because the publisher "should have anticipated that infringement may occur in locales without New York." *Id.* at 1199.

In *Payne v. Kristofferson*, 631 F. Supp. 39, 41 (N.D. Ga. 1985), a Georgia songwriter alleged copyright infringement against a California performer, a Tennessee songwriter, and a Tennessee music publisher. The district court recognized that the Georgia long-arm statute had been interpreted to allow the exercise of jurisdiction where a tortious act occurred outside the state if the damage resulting from the act occurred within the state. *Id.* at 42. Copyright infringement is a tort. *Id.* at 43.

The court ruled that the plaintiff established purposeful availment because the defendants performed, promoted and sold the plaintiff's copyrighted material on a nationwide basis. *Id.* at 42. Although the defendants did not directly ship the allegedly infringing song into Georgia and did not have actual and direct control over the sale and distribution of the song within Georgia, the court ruled it *could be inferred* the defendants "knew and intended that their song would be distributed and performed nationwide, including within the State of Georgia." *Id.* (emphasis added).

The court stated that sufficient minimum contacts existed to avoid due process concerns because the defendants knowingly licensed their song to a distributor who distributed nationally, including in Georgia, and it was foreseeable that the recordings would reach Georgia citizens and consumers. *Id.* at 42-43. Consequently, the court held that defendants'

actions amounted to a purposeful and "intentional infusion" of their product into the nationwide stream of commerce, and defendants had sufficient causal responsibility for the sales and performances of their song in Georgia to permit the conclusion that, by their own volition, they submitted themselves to answer in Georgia for injuries caused there. *Id.* at 42-43.

The district court considered whether it might be inconvenient for the defendants to litigate the case in Georgia, but concluded that the burden on the defendants was outweighed by the potential inconvenience to the plaintiff, "who should not be forced to sue in a foreign forum on a cause of action allegedly arising from Defendants' introduction of its infringing song into Georgia's stream of commerce." *Id.* at 43.

b. Post-*Asahi* music copyright cases

Even after *Asahi*, a New York federal district court applied the stream of commerce theory in a copyright infringement action because it "remains the law in this Circuit as well as elsewhere." *Editorial Musical Latino Americana v. Mar Int'l Records, Inc.*, 829 F. Supp. 62, 66 (S.D.N.Y. 1993) (citing, among other cases, *Irving v. Owens-Corning Fiberglass Corp.*, 864 F.2d 383, 385-86 (5th Cir. 1989), for its rejection of Justice O'Connor's plurality opinion and adherence to *World-Wide Volkswagen*). Under New York law, offering one copy of an infringing work for sale, even if an actual sale does not occur, constitutes commission of a tortious act within the state sufficient to permit the federal court to exercise jurisdiction over the alleged infringers. *Id.* at 64. The court observed that the critical due process inquiry is whether the manufacturer sought to serve, directly

or indirectly, "the market for its phonorecords in New York." *Id.* at 66. The court quoted *World-Wide Volkswagen*, 444 U.S. at 297-98:

> Hence, if the sale of a product of [an out-of-state] manufacturer or distributor . . . is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or others. The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.

Id. at 65. The district court briefly referred to *Asahi*, without noting that it is a plurality decision, as applying the "well-established due process standard" of *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457 (1940)), that a non-resident defendant must have certain minimum contacts with the forum state such that the maintenance of the suit does not offend "'traditional notions of fair play and substantial justice.'" *Id.* at 65.

In *Chi-Lites v. San Juan Music Group, Ltd.*, 99 C 3393, 1999 U.S. Dist. LEXIS 17233 (N.D. Ill. 1999), the district court held in a music copyright infringement case that the stream of commerce theory of jurisdiction enunciated in *World-Wide Volkswagen* remained controlling because only

a plurality of Justices endorsed the restrictive view advocated by Justice O'Connor in *Asahi*. In *Chi-Lites*, the defendant music distributor, a New Jersey corporation, contended that it merely licensed music recordings and that it did not have minimum contacts with Illinois. *Id.* at *3. The district court held that it did have minimum contacts because, under the Illinois long-arm statute, the defendant did not "attempt to deny that its distribution network may ultimately cause some of its licensed-music to be available for sale in Illinois[,]" and the defendant did not squarely rebut the allegation that it distributes and sells music recordings in the United States and throughout the world. *Id.* at * 11. "That San Juan did not engage in a direct marketing, solicitation, or advertising campaign in Illinois is of minimal consequence." *Id.* In so holding, the court recognized the O'Connor plurality attempted to "narrow the breadth of the stream of commerce theory[,]" *id.* at *9-10, but distinguished the Chi-Lites' case as unlike *Asahi* in that it did not involve a defendant facing "obstacles to defending a suit in a distant forum, such as where the defendant must do battle in a foreign country's judicial system[,]" citing *Asahi*, 480 U.S. at 114. *Id.* at *15.

In *Linzer v. EMI Blackwood Music, Inc.*, 904 F. Supp. 207, 213-14 (S.D.N.Y. 1995), the district court held that the individual defendants' licensing of songs through BMI and the Harry Fox Agency and collecting royalties pursuant to the licenses amounted to contracting to sell goods and services in New York sufficient to confer personal jurisdiction pursuant to the long-arm statute. The court said that, "by soliciting the services of New York licensing agents for the licensing and promotion of the Songs in this state and throughout the nation, a party contracts to sell its goods or services here and thus exposes itself to the jurisdiction of New York courts." *Id.* at 214 (citing *Greenky v. Irving Music*,

Inc., 217 U.S.P.Q. 750 (S.D.N.Y. 1981)). The court did not mention *Asahi* in its opinion. The court relied on the *International Shoe* standard to hold that, through primarily the licensing activities, the defendants took continued actions to promote their interests and to receive profit from them, creating a clear New York nexus for the exercise of personal jurisdiction. *Id.*

A Louisiana district court applied the *Calder* "effects test" to hold that it could exercise specific jurisdiction over a non-resident music publisher that licensed an allegedly infringing song to its related company, Tufamerica, which in turn produced, released, marketed, and sold a compact disc containing the song in Louisiana. *Johnson v. Tuff N Rumble Mgt., Inc.*, 99-1374, 1999 U.S. Dist. LEXIS 19574 * 13-14 (E.D. La. 1999). The court ruled that, when Tuff-n-Rumble licensed the song, it "could reasonably foresee that its affiliate would use the licensing agreement to sell the song in Louisiana, a national center of jazz music and culture, and therefore plaintiffs would feel the effects of its allegedly tortious infringement activity here." *Id.* at *16. The court further held that "it is highly likely that Tuff-n-Rumble reasonably anticipated that the licensing agreement would lead to distribution and sale of the song in Louisiana. That Tuff-n-Rumble may have entered into the licensing agreement with Tufamerica outside of Louisiana does not defeat personal jurisdiction under *Calder*." *Id.* at *17.

Finally, in *Doss v. Alabama*, No. 93-2438, 1994 U.S. Dist. LEXIS 6050 at *5-7 (D.D.C. 1994), the district court applied the "transacting business" component of the District of Columbia long-arm statute and ruled, under *World-Wide Volkswagen*, that personal jurisdiction existed. The court concluded that, when the defendant entered into publishing

contracts with Polygram and RCA "he, no doubt, anticipated nationwide distribution, promotion, and sales of the recordings of his songs." *Id.* at *7. In the court's view, "[a]long with the privilege of conducting business in every state and the District of Columbia, should come the expectation of being haled into court in those districts." *Id.* at *7. The court did not mention the *Asahi* plurality opinions.

Similarly to the claim of libel discussed in *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 776 (1984) (quoted case omitted), the state of Tennessee

> has an especial interest in exercising judicial jurisdiction over those who commit torts within its territory. This is because torts involve wrongful conduct which a state seeks to deter, and against which it attempts to afford protection, by providing that a tortfeasor shall be liable for damages which are the proximate results of his tort.

Copyright infringement is a commercial tort that is deemed to occur at the point of consumer purchase. *Linzer*, 904 F. Supp. at 214. The Tennessee long-arm statute extends jurisdiction over "[a]ny tortious act or omission within this state[,]" the "transaction of any business within the state[,]" and on "[a]ny basis not inconsistent with the constitution of this state or of the United States[.]" Tenn. Code Ann. §§ 20-2-214(a)(1), (2) & (6).

Petitioners established through the presentation of evidence in the district court that NTW purposefully directed conduct to Tennessee with respect to its music compositions by taking the following actions:

- NTW granted the rights to distribute sound recordings containing NTW's compositions in Tennessee and throughout the nation, in exchange for royalty payments on those future sales;

- NTW granted distribution rights, knowing and expecting that the distributor would commercially exploit the recordings in Tennessee and throughout the nation;

- NTW entered into the licensing agreements, knowing that the agreements created NTW's continuing financial interest in commercial exploitation of those recordings in Tennessee and throughout the nation;

- NTW receives and accepts royalties from sales in Tennessee of sound recordings containing these compositions;

- NTW and its distributor market in Tennessee and throughout the nation;

- actual commercial exploitation of sound recordings containing NTW's compositions occurred in Tennessee pursuant to NTW's licensing agreement;

- NTW initially affiliated in Tennessee with ASCAP and BMI and continues to benefit from those affiliations through the PROs' enforcement and catalog-licensing services for performances of music compositions;

- NTW essentially relies on the recording company and the PROs to perform essential business functions for NTW in Tennessee and throughout the nation; and

- NTW granted a synchronization license for inclusion of the "Havin' Thangs" composition in a film that was released in theatres and on television, and sold and rented on video and DVD, in Tennessee and throughout the nation.

Under the music copyright cases discussed, petitioners established personal jurisdiction over NTW under the stream of commerce theory that appears to remain intact after *Asahi*. *See, e.g.*, *Editorial Musical Latino Americana*, 829 F. Supp. at 66; *Chi-Lites*, 1999 U.S. Dist. LEXIS 17233 at *9-11; *Doss*, 1994 U.S. Dist. LEXIS 6050 at *5-7. By seeking nationwide exploitation of its music compositions through licensing and promotion, NTW's actions amounted to a purposeful and "intentional infusion" of its product into the nationwide stream of commerce, and NTW had sufficient causal responsibility for the sales and performances of the allegedly infringing song and film in Tennessee to permit the conclusion that, by its own volition, NTW submitted itself to answer in Tennessee for injuries caused there. *Payne*, 631 F. Supp. at 42-43.

The court of appeals' decision below appears to be a minority view within the post-*Asahi* jurisdictional analysis of most circuits, and it is certainly not in accord with the pre- and post-*Asahi* music copyright cases.

Copyright owners expect certainty and stability in the law in order to protect their property interests. The decision below does not accomplish these worthy goals. Rather, the decision requires copyright owners to bring their infringement claims in multiple jurisdictions where infringing publishers, distributors, record labels, and entertainment companies reside, even when the claims arise from a common nucleus of fact and could be resolved in one matter presented in one proper jurisdiction. The unfortunate result is to increase exponentially the burden placed, not only on copyright owners who seek to protect their federal rights, but on the federal courts designated to hear and resolve copyright disputes.

CONCLUSION

Petitioners present this Court with an opportunity to clarify personal jurisdiction analysis and to elucidate its application within copyright law. For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DATED AND FILED MAY 5, 2003

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

02-5165 through 02-5175

BRIDGEPORT MUSIC, INC., et al.,

Plaintiffs-Appellants,

v.

STILL N THE WATER PUBLISHING, et al.,

Defendants-Appellees.

02-5227 through 02-5234

BRIDGEPORT MUSIC, INC., et al.,

Plaintiffs-Appellants,

v.

DM RECORDS, INC., et al.,

Defendants-Appellees.

Appendix A

October 29, 2002, Argued and Submitted

May 5, 2003, Decided

May 5, 2003, Filed

Before: KEITH and DAUGHTREY, Circuit Judges; KATZ, District Judge.*

OPINION

PER CURIAM Plaintiffs-Appellants Bridgeport Music, Inc., Southfield Music, Inc., Westbound Records, Inc., and Nine Records, Inc. (collectively "Bridgeport") appeal the district court's dismissal of eleven individual actions for lack of personal jurisdiction over Defendants-Appellees N-the-Water Publishing, Inc., individually and d/b/a Still N the Water Publishing (collectively "NTW").[1] Bridgeport also appeals the dismissal of eight individual actions filed against

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* The Honorable David A. Katz, United States District Judge for the Northern District of Ohio, sitting by designation.

1. NTW is one music publishing company operating under two distinct names, N-the-Water Publishing, Inc. and N-the-Water Publishing, Inc. d/b/a Still N the Water Publishing, Inc. The two arms of the company are named as distinct defendants, but the companies conduct the same business, have the same ownership, and have submitted joint motions and briefs. The only apparent distinction between the two companies is that they affiliate with different performing rights organizations ("PROs"). N-the-Water Publishing affiliates with the American Society of Composers, Authors and Publishers ("ASCAP"), while Still N the Water Publishing affiliates with Broadcast Music, Inc. ("BMI").

Appendix A

Defendants-Appellees DM Records, Inc., individually and a/s/t Bellmark Records (collectively "DM"). For the reasons set forth below, we **AFFIRM** the district court's order granting NTW's motion to dismiss for lack of personal jurisdiction, but **REVERSE** the ruling as to DM and **REMAND** for further findings.

I. BACKGROUND

This action is one of several hundred filed by Appellants against entities and/or individuals associated with the "rap" or "hip-hop" music industry. Appellants are all Michigan corporations engaged in, *inter alia*, music publishing, recording and distributing sound recordings, and other forms of commercial exploitation of musical copyrights. On May 4, 2001, Appellants filed suit alleging infringement upon their copyrights in several sound recordings and musical compositions through "sampling" of Appellants' recordings and/or compositions in subsequent recordings, compositions, and performances.[2] The original complaint, *Bridgeport Music, Inc. v. 11C Music*, No. 3:01-0412 (M.D. Tenn. 2001), asserted nearly 500 claims against approximately 800 defendants seeking declaratory judgment, injunctive relief, and damages for infringement and violations of the Tennessee

2. As used in the context of this litigation, "sampling" is the process of copying portions of prior master sound recordings directly onto new sound recordings and then rapping on top of the new sound recording. J.A. 14. The allegedly infringing samples in the instant action are asserted to be used in rap records and contain elements of Bridgeport/Southfield compositions and/or Westbound/Nine Record recordings, such as synthesizer, rhythm background, piano, horn, vocals, or drums.

Appendix A

Consumer Protection Act, Tenn.Code Ann. § 47-18-101 *et seq.* On July 25, 2001 the district court severed the case by count into 476 cases, resulting in the filing of numerous amended complaints based on different allegedly infringing musical compositions and/or sound recordings.[3]

On September 28, 2001 Appellants filed an amended complaint naming Appellee DM as a defendant in eight of the newly severed cases.[4] On October 1, 2001, Appellants

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3. A musical composition consists of rhythm, harmony, and melody. *See* 1 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 2.05[D]. As described by Appellees, a musical composition "is a particular sequence and arrangement of lyrics and/or music that comprise what most people refer to as a 'song.' " Under the copyright act, " 'sound recordings' are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work." 17 U.S.C. § 101. Sound recordings and their underlying musical compositions are separate works with their own distinct copyrights. *See* 17 U.S.C. § 102(a)(2), (7).

4. The eight allegedly infringing compositions and corresponding appellate case numbers are as follows:

> (1) No. 02-5227, "BOBYAHEAD a/k/a/ Bobyahead," in which DM allegedly owns the administrative rights and possibly owns part of the copyright, contained on DM's sound recording "The Best of Tag Team."
>
> (2) No. 02-5228, "Fool Get A Clue," in which DM allegedly owns the administrative rights and possibly owns part of the copyright, contained on the "Future Rhythm" and "Fool Get A Clue" recordings.

(Cont'd)

filed an amended complaint naming Appellee NTW as a defendant in eleven of the newly severed cases.[5]

(Cont'd)

> (3) No. 02-5229, "Freestyle," in which DM allegedly owns the administrative rights and possibly owns part of the copyright, contained on "Best of Tag Team."
>
> (4) No. 02-5230, "Funky Situation/Back From Another Mission," contained on DM's release, "The Best of Tag Team."
>
> (5) No. 02-5231, "Get Nasty," in which DM allegedly owns the administrative rights and possibly owns part of the copyright.
>
> (6) No. 02-5232, "It's Somethin'," in which DM allegedly owns the administrative rights and the copyright, contained on "The Best of Tag Team."
>
> (7) No. 02-5233, "Oregano Flow," on DM's re-release "Future Rhythm" and/or "Fool Get a Clue."
>
> (8) No. 02-5234, "Pump It," on DM's release "Super Quad."

Appellants' Br. at 10, n. 5.

5. The eleven allegedly infringing compositions and corresponding appellate case numbers are as follows:

> (1) No. 02-5165, Aggravated Monkeys.
>
> (2) No. 02-5166, Buddah Nature.

(Cont'd)

Appendix A

NTW is a Texas corporation with its principal place of business in Texas. As a music publisher, NTW's business consists primarily of owning and exploiting musical compositions through mechanical licensing.[6] Appellants assert that NTW has infringed on their musical composition copyrights by licensing infringing works, as well as by sampling certain protected compositions and distributing the infringing compositions and sound recordings in Tennessee and elsewhere.

(Cont'd)

(3) No. 02-5167, Bumbell.

(4) No. 02-5168, Getos in the Mind.

(5) No. 02-5169, Good Girl Gone Bad.

(6) No. 02-5170, Havin' Thangs.

(7) No. 02-5171, I Ain't Going Back.

(8) No. 02-5172, Lettin' Em Know.

(9) No. 02-5173, Straight Gangstaism.

(10) No. 02-5174, Straight Madness.

(11) No. 02-5175, Two to the Head.

Appellants' Br. at 11, n. 5; *see also* JA 86-88.

6. Under a typical license agreement, a publisher's compositions are incorporated into a record label's sound recordings. A "mechanical royalty" is the royalty generated from sales of the sound recording.

Appendix A

DM is a family-owned and operated independent record company located in Florida that produces and distributes sound recordings. It acquires copyrights, distributes sound recordings, and engages in publishing, administration of copyrights, and licensing. Appellants assert that DM has infringed on their copyrights by sampling certain protected compositions and distributing the infringing compositions and sound recordings in Tennessee and elsewhere.

On July 9, 2001, NTW moved to dismiss all eleven actions asserted against it for lack of personal jurisdiction and improper venue and renewed the motion post-severance. On October 22, 2001, DM moved to dismiss for lack of personal jurisdiction, improper venue, and failure to state a claim upon which relief can be granted. The district court granted the parties a limited time to conduct jurisdictional discovery, but did not conduct a hearing on either NTW or DM's motions to dismiss.

In January 2002 the district court granted NTW's motion and between January 18 and January 29 entered dismissal orders in the 11 NTW actions for lack of personal jurisdiction. On January 29, 2002, the district court granted DM's motion and dismissed the eight actions for lack of personal jurisdiction. The district court therefore denied as moot the motions to dismiss for improper venue and failure to state a claim. The district court denied Appellants' subsequent motion for reconsideration and entered final judgment on the claims asserted against DM and NTW pursuant to Federal Rule of Civil Procedure 54(b). On February 15, 2002, Bridgeport filed suit against NTW in Houston, Texas, *Bridgeport Music, Inc. v. N-The-Water Publishing, Inc.*,

No. 02-0585 (S.D. Tex. filed Feb. 15, 2002), based primarily on the same facts alleged in the instant action.

II. DISCUSSION

A. Standard of Review

"The decision to exercise personal jurisdiction is a question of law based on the Due Process Clause of the Constitution." *Tobin v. Astra Pharm. Prods., Inc.*, 993 F.2d 528 (6th Cir. 1993) (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72, 85 L. Ed. 2d 528, 105 S. Ct. 2174 (1985)). As a question of law, this Court reviews *de novo* the district court's determination as to personal jurisdiction. *See id.*

B. Personal Jurisdiction Standard

"Where a federal court's subject matter jurisdiction over a case stems from the existence of a federal question, personal jurisdiction over a defendant exists 'if the defendant is amenable to service of process under the [forum] state's long-arm statute and if the exercise of personal jurisdiction would not deny the defendant[ ] due process.' " *Bird v. Parsons*, 289 F.3d 865, 871 (6th Cir. 2002) (citation omitted). Where the state long-arm statute extends to the limits of the due process clause, the two inquiries are merged and the court need only determine whether exercising personal jurisdiction violates constitutional due process. *See Nationwide Mut. Ins. Co. v. Tryg Int'l Ins. Co., Ltd.*, 91 F.3d 790, 793 (6th Cir. 1996). As "the Tennessee long-arm statute has been interpreted as coterminous with the limits on personal jurisdiction

imposed by the due process clause,"[7] *Payne v. Motorists' Mut. Ins. Cos.*, 4 F.3d 452, 454 (6th Cir. 1993), we address only whether exercising personal jurisdiction over Appellees is consistent with federal due process requirements.

"Personal jurisdiction can be either general or specific, depending upon the nature of the contacts that the defendant has with the forum state." *Bird*, 289 F.3d at 873. In the instant action, the district court ruled as to both general and specific jurisdiction, finding both lacking against DM and NTW. On appeal, Bridgeport challenges the district court's findings only as to specific jurisdiction. Specific jurisdiction is proper over Appellees only if their contact with Tennessee satisfies the three-part test established in *Southern Machine Company v. Mohasco Industries, Inc.*:

> First, the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must arise from the defendant's activities there. Finally, the acts of the defendant or consequence caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable.

401 F.2d 374, 381 (6th Cir. 1968).

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7. Under Tennessee's long-arm statute, jurisdiction may be asserted on "any basis not inconsistent with the constitution of this state or of the United States." Tenn.Code Ann. § 20-2-214(a)(6).

Appendix A

In the instant action, the district court concluded that neither NTW nor DM had purposefully availed themselves of the privilege of acting in or causing a consequence in the forum state and therefore found personal jurisdiction lacking over both NTW and DM. Having made that determination, the district court did not make findings as to the remaining two elements of the *Mohasco* test. On appeal, the parties chiefly dispute the district court's purposeful availment findings, but also present arguments as to the remaining *Mohasco* factors. However, because the district court did not address these factors, and because the appellate record does not lend itself to a ruling on these factors as to each of the 18 individual actions before the Court, we address only the district court's purposeful availment determination.

The district court did not conduct an evidentiary hearing, and we therefore review the pleadings and other documentary evidence in a light most favorable to Bridgeport without considering Appellees' controverting assertions. *See Calphalon Corp. v. Rowlette*, 228 F.3d 718, 721 (6th Cir. 2000). " 'Dismissal in this procedural posture is proper only if all the specific facts which the plaintiff . . . alleges collectively fail to state a prima facie case for jurisdiction.' " *Kerry Steel, Inc. v. Paragon Indus.*, 106 F.3d 147, 149 (6th Cir. 1997) (quoting *Theunissen v. Matthews*, 935 F.2d 1454, 1458 (6th Cir. 1991)). As plaintiff, Bridgeport bears the burden of establishing jurisdiction, *see Tobin*, 993 F.2d at 543, but need only made a prima facie showing. *See Calphalon*, 228 F.3d at 721.

Appendix A

C. Purposeful Availment

Under the first prong of the *Mohasco* test, Appellants must establish that Appellees purposefully availed themselves of the privilege of acting in Tennessee or causing a consequence in Tennessee. " 'Purposeful availment' is something akin to a deliberate undertaking to do or cause an act or thing to be done in [the forum state] or conduct which can be properly regarded as a prime generating cause of the effects resulting in [the forum state], something more than a passive availment of [the forum state's] opportunities.' " *Neogen Corp. v. Neo Gen Screening, Inc.*, 282 F.3d 883, 891 (6th Cir. 2002) (internal citation and quotation omitted). "The 'purposeful availment' requirement is satisfied when the defendant's contacts with the forum state 'proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum State,' and when the defendant's conduct and connection with the forum are such that he 'should reasonably anticipate being haled into court there.' " *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1263 (6th Cir. 1996) (quoting *Burger King*, 471 U.S. at 474-75. The " 'purposeful availment' requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts, or of the 'unilateral activity of another party or a third person.' " *Burger King*, 471 U.S. at 475 (internal citation omitted); *see also Lak, Inc. v. Deer Creek Enters.*, 885 F.2d 1293, 1300 (6th Cir. 1989). The emphasis in the purposeful availment inquiry is whether the defendant has engaged in "some overt actions connecting the defendant with the forum state." *Dean v. Motel 6 Operating L.P.*, 134 F.3d 1269, 1274 (6th Cir. 1998). If a plaintiff can demonstrate purposeful availment,

the absence of physical contacts with the forum state will not defeat personal jurisdiction over a non-resident defendant. *See Burger King*, 471 U.S. at 476; *CompuServe*, 89 F.3d at 1265.

1. Stream of commerce "plus" theory

As a preliminary matter, we note that in the instant action, the district court, as well as the parties on appeal, presume that this Circuit has adopted Justice O'Connor's approach to purposeful availment as articulated in *Asahi Metal Industry Company, Ltd. v. Superior Court*, 480 U.S. 102, 94 L. Ed. 2d 92, 107 S. Ct. 1026 (1987) (O'Connor, J.) (plurality op.). In *Asahi*, which reflects the Supreme Court's most recent discussion of purposeful availment, the Court debated whether a foreign manufacturer that places a product in the stream of commerce purposefully avails itself of the privilege of conducting business in a state where the product ultimately is found. In her plurality opinion, which embraces what has come to be known as the "stream of commerce 'plus' " theory, Justice O'Connor opined that "the placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State." *Asahi*, 480 U.S. at 112. Although a majority of the *Asahi* Court agreed that jurisdiction was not proper, Justice O'Connor secured only three other justices to join in her articulation of a stream of commerce "plus" theory. *See id.* at 116-22.

While some appellate courts have expressly adopted one of *Asahi's* conflicting conceptions of minimum contacts via the stream of commerce, most circuits, including the Sixth

Circuit, have avoided explicitly articulating a preference. *See, e.g., Pennzoil Prods. Co. v. Colelli & Assocs.*, 149 F.3d 197 (3d Cir. 1999) (declining to expressly adopt any of the *Asahi* plurality positions); *Barone v. Rich Bros. Interstate Display Fireworks Co.*, 25 F.3d 610, 613-15 (8th Cir. 1994) (adopting a position consistent with that of Justice Brennan); *Ruston Gas Turbines, Inc. v. Donaldson Company*, 9 F.3d 415, 420 (5th Cir. 1993) (same); *Boit v. Gar-Tec Products, Inc.*, 967 F.2d 671, 683 (1st Cir. 1992) (adopting a position consistent with that of Justice O'Connor); and *Madara v. Hall*, 916 F.2d 1510, 1519 (11th Cir. 1990) (same); *Vermeulen v. Renault, U.S.A., Inc.*, 985 F.2d 1534, 1548 (11th Cir. 1993) ("Because jurisdiction . . . over [the defendant] in this case . . . is consistent with due process under the more stringent 'stream of commerce plus' analysis adopted by the [O'Connor] plurality, we need not determine which standard actually controls this case"); *Madara v. Hall*, 916 F.2d 1510, 1519 (11th Cir. 1990) (concluding that exercise of jurisdiction must satisfy the test articulated by the O'Connor plurality).

Although this Circuit thusfar has avoided expressly adopting a position, the only published opinions in our Circuit directly addressing the issue, albeit admittedly in dicta, express a leaning toward Justice O'Connor's approach. In *CompuServe*, we noted that the "injection of . . . [a] product into the stream of commerce, without more, would be at best a dubious ground for jurisdiction." *See CompuServe*, 89 F.3d at 1265. In *Tobin*, the court did not expressly adopt Justice O'Connor's stream of commerce "plus" test, but did cite with approval from Justice O'Connor's opinion and acknowledged without rebuke that the district court had relied heavily on Justice O'Connor's opinion. *See Tobin*, 993 F.2d at 543.

In the instant action, the parties do not call upon the Court to adopt one *Asahi* approach over the other, and thus it is tempting once again to defer committing to one particular approach. However, unlike other instances in which an analysis under all three *Asahi* approaches would yield the same result, thus permitting avoiding establishing a clear rule, the facts in the instant action, particularly under the relaxed prima facie standard, would seem to dictate different results under the three *Asahi* plurality approaches. Therefore, instead of undertaking the time-consuming task of analyzing the facts under all three approaches, and then being left to select an approach based upon the end result, we make clear today our preference for Justice O'Connor's stream of commerce "plus" approach, for the reasons set forth in that opinion, and conduct the remainder of our analysis accordingly.

2. Purposeful availment as to NTW

a. Licensing and royalties

To show purposeful availment by NTW, Bridgeport first argues that NTW issued mechanical licenses to Rap-A-Lot Records ("RAL") and other entities for allegedly infringing compositions and has received royalties therefrom. Bridgeport asserts that in relation to these mechanical licenses, NTW has a financial interest in RAL selling as many records as possible that contain NTW's compositions, NTW does not desire to limit exploitation of its compositions to a "less-than-national" market, NTW has no objection to NTW's compositions being sold in Tennessee, and NTW knows that RAL distributes nationally and is likely to exploit NTW's compositions throughout the entirety of the United States,

including in Tennessee. Based on the rationale set forth in *Tobin*, Bridgeport argues that the foregoing conduct constitutes purposeful availment.

In *Tobin*, the court found purposeful availment based on the existence of a nationwide distribution agreement. The agreement required the defendant distribution company, Astra, to distribute the drug rotidrine on behalf of defendant manufacturer, Duphar, throughout Astra's territory. The relevant agreement defined the distribution territory as "the United States of America, its territories and possessions, and Puerto Rico." *Tobin*, 993 F.2d at 543 (explaining that a manufacturer cannot insulate itself from suit merely by using an independent national distributor to market its products).

In contrast to *Tobin*, NTW's contacts with Tennessee in the instant action lack the additional element present in *Tobin*, chiefly, the fact that the *Tobin* defendants were not merely aware that their distributor was likely to market the product in all fifty states; rather, the parties' contract required it. Unlike in *Tobin*, Bridgeport does not assert that NTW entered into a distribution agreement with RAL or any other party that placed an affirmative obligation upon the third party to distribute NTW's compositions in Tennessee or elsewhere. Bridgeport even concedes in its brief that with respect to the RAL-NTW licensing, "how the subject composition is exploited is 'pretty much out of [NTW's] hands.' " NTW's knowledge that RAL was likely to distribute NTW's compositions nationally, coupled with its lack of objection to Tennessee sales, if such sales were ever to occur, is insufficient conduct upon which to predicate purposeful availment.

As further support for its position, Bridgeport asserts that allegedly infringing NTW compositions on RAL sound recordings have been sold by at least two Nashville, Tennessee retailers. However, Bridgeport does not adduce any evidence that NTW took any actions to direct the compositions to Tennessee. Rather, Bridgeport asserts that NTW does not doubt that such sales have occurred and does not object to Tennessee distribution and sales. Bridgeport makes similar arguments with respect to a synchronization licence related to the film "Dangerous Minds."[8] However, as with the mechanical licenses, the Court finds these contacts too random, fortuitous, and attenuated for a finding of purposeful availment.

b. Advertising

Bridgeport asserts that NTW has engaged in advertising and marketing activities directed at Tennessee and that these activities require a finding of purposeful availment. Bridgeport also argues that RAL advertises nationally, including in Tennessee, "on behalf of and to the financial benefit of NTW" on national television and radio spots, and

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8. "Synchronization" is the process of combining sound recordings of musical compositions with visual images. A "synchronization license" is a license for use of a composition in a film, pre-recorded radio or television program, or radio or television commercial. *See* 2 Lindey On Entertainment, Publishing and the Arts § 7.01 (2d ed. 2000). Under copyright law, an entity wishing to synchronize music with visual images in a video, motion picture, etc., must obtain a synchronization license from the musical composition copyright holder and must also obtain a license from the sound recording copyright holder.

in national magazines. Appellants' Br. at 16. As evidence of NTW's marketing activities, NTW points to a single statement from the deposition of Mr. Bruce Toval, NTW's CEO, that "we attempt to market nationally."[9]

Although it has been established in this Circuit that "advertising is among the activities that constitute 'reaching out' to forum state residents," *Creech v. Roberts*, 908 F.2d 75, 79 (6th Cir. 1990) (citing *LAK*, 885 F.2d at 1300), the instant record does not support a finding of purposeful availment based upon a single statement that NTW "attempts to market nationally."[10] The record does not contain any

9. The record also reflects that Mr. Toval was asked earlier in his deposition if NTW "undertakes any form of advertising or marketing to encourage exploitation of its musical compositions." Unfortunately, the pages of the deposition containing Mr. Toval's response to that question have not been made part of the joint appendix.

10. We take no position today as to whether, post-*Asahi*, evidence of nationwide advertising is sufficient for a finding of purposeful availment, but note that at least two of our sister circuits have determined that such conduct is insufficient. *See Federated Rural Elec. Ins. Corp. v. Kootenai Elec. Coop.*, 17 F.3d 1302, 1305 (10th Cir. 1994) ("evidence of mere placement of advertisements in nationally distributed papers or journals does not rise to the level of purposeful contact with a forum required by the Constitution in order to exercise personal jurisdiction over the advertiser"); *Singletary v. B.R.X., Inc.*, 828 F.2d 1135, 1136 (5th Cir. 1987) ("advertising in national publications is not in itself sufficient to subject a defendant to personal jurisdiction"); *but see United States SEC v. Carrillo*, 115 F.3d 1540, 1545 (11th Cir. 1999) ("advertising that is reasonably calculated to reach the forum may constitute purposeful availment of the privileges of doing business in the forum").

evidence of advertising directly targeting or even actually reaching Tennessee. Nor does the record reflect the extent and nature of NTW's advertising. Moreover, Bridgeport does not actually adduce any evidence that RAL undertook advertising expressly on NTW's behalf, nor does Bridgeport provide any basis on which to impute RAL's conduct to NTW.

c. NTW's contract with Bluewater

Appellants' assertions as to NTW's contract with Bluewater, a Tennessee corporation, require a brief departure from the Court's purposeful availment analysis. Bridgeport asserts that NTW's contract with Tennessee-based Bluewater is sufficient for a finding of personal jurisdiction because the contract is with a Tennessee entity and contains choice of law and venue provisions relating to Tennessee. NTW does not dispute that it contracted with Bluewater to collect foreign royalties related to NTW's compositions or that the contract contained a choice of law and venue provisions designating Tennessee law and venue. Appellees do, however, complain that Bridgeport did not assert this matter before the district court and thus that it is not appropriate for consideration on appeal.

As to the Bluewater contract, the district court did not make a finding as to purposeful availment and instead, in a footnote, indicated that the contract could not serve as a basis for jurisdiction because Bridgeport did not assert that the contract is related to the infringement action against NTW. Bridgeport for the first time on appeal now makes such arguments, arguments which we decline to address. *See Preferred RX v. Am. Prescription Plan*, 46 F.3d 535, 549 (6th Cir. 1995) ("subject to limited exceptions, this court

will not consider issues not presented to the district court but raised for the first time on appeal"); *Overstreet v. Lexington-Fayette Urban County Gov't*, 305 F.3d 566, 578 (6th Cir. 2002); *Bailey v. Floyd County Bd. of Educ.*, 106 F.3d 135, 143 (6th Cir. 1997) (explaining that the "court will not consider arguments raised for the first time on appeal unless our failure to consider the issue will result in a plain miscarriage of justice"). We find no basis to depart from this principle in the instant action.

d. NTW's affiliation with ASCAP and BMI

With respect to NTW's affiliation with ASCAP and BMI, Bridgeport cites the following conduct in support of purposeful availment: (1) NTW initially affiliated with ASCAP and BMI through the PROs' Tennessee offices; (2) the PROs collect royalties, monitor performances, and perform enforcement functions on behalf of their members; and (3) NTW licensed its entire music composition catalog to ASCAP and BMI, which in turn re-licensed these compositions to third parties.

With respect to the collection, monitoring, enforcement, and licensing activities, the record does not support a finding of purposeful availment. As with the mechanical licenses granted to RAL, the record does not reflect that BMI or ASCAP have any affirmative duty to license or market the subject compositions specifically in Tennessee or even nationally. As to the royalty collection, monitoring, and enforcement functions, the nature of these functions has not been submitted with sufficient clarity to the Court as to permit a purposeful availment finding.

Appendix A

With respect to the initial contractual affiliation with the PROs through the Tennessee offices of these organizations, in analyzing whether contractual relationships are sufficient to confer specific jurisdiction, the Court focuses on the actions of the defendant in the negotiation and performance of the contract to determine whether it should be subject to suit in the forum state. *See Nationwide*, 91 F.3d at 795. As explained in *Nationwide*:

> The existence of a contract with a citizen of the forum state, standing alone, will not suffice to confer personal jurisdiction over a foreign defendant. Rather, "prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing . . . must be evaluated in determining whether the defendant purposefully established minimum contacts within the forum."

Id. at 795 (internal citation omitted).

As to these factors, Bridgeport does not assert that NTW had any type of substantial contacts or negotiations specifically with the Tennessee offices of BMI and ASCAP, that the contracts' terms contained Tennessee forum or venue selection clauses, or that the parties' course of dealing implicated conduct in the Tennessee forum, other than by way of initial affiliation and the collection of royalties for songs performed in Tennessee. Bridgeport even notes that after initial affiliation, NTW's contact with BMI and ASCAP was maintained through offices not based Tennessee. Based on the foregoing, we cannot find that NTW's "prior

negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing" support a finding of purposeful availment.

e. Internet sales

In this Circuit, "operation of an Internet website can constitute the purposeful availment of the privilege of acting in a forum state under the first *Mohasco* factor 'if the website is interactive to a degree that reveals specifically intended interaction with residents of the state.' " *Bird*, 289 F.3d at 874 (quoting *Neogen*, 282 F.3d at 890). Bridgeport asserts that NTW allows and expects its compositions to be sold on the internet and thus has availed itself of doing business in Tennessee. However, Bridgeport does not assert that NTW hosts or operates a website, let alone one that is sufficiently interactive for a finding a purposeful availment. Even under the more relaxed prima facie standard, Bridgeport's arguments are insufficient to establish purposeful availment as the result of internet activity.

f. Summary of purposeful availment analysis as to NTW

As none of the foregoing factors support exercising specific personal jurisdiction over NTW, the Court affirms the district court's dismissal of all 11 actions against NTW.

3. Purposeful availment as to DM

As with NTW, the district court concluded that DM did not purposefully avail itself of the forum state and found

personal jurisdiction lacking. On appeal, Bridgeport sets forth numerous reasons as to why DM has purposefully availed itself of the Tennessee forum. We find two of these arguments persuasive and dispositive as to a finding of purposeful availment and thus do not address the remainder of Appellants' arguments.

a. Nationwide distribution agreement between DM and Ryco

The record reflects that DM entered into a distribution contract with Ryco Distribution Partners ("Ryco") in which DM sought nationwide distribution of its records throughout "the United States, its territories, commonwealth, possessions. . . ." Relying upon *Tobin*, Bridgeport asserts that this nationwide distribution agreement is sufficient for a finding of purposeful availment.

In *Tobin*, the Court indeed found purposeful availment based on the existence of a nationwide distribution agreement. Saliently, the territory in the *Tobin* distribution agreement was defined as "the United States of America, its territories and possessions, and Puerto Rico." *Tobin*, 993 F.2d at 543. Although in *Tobin* we mentioned a number of factors supporting our finding of purposeful availment, the primary emphasis of the opinion is on the "deliberate decision [Duphar made] to market ritodrine in all 50 states," as opposed to seeking only a regional distribution agreement. *Id.* We found purposeful availment, even though Duphar did "nothing in particular to purposefully avail itself of the Kentucky market as distinguished from any other state in the union." *Id.* at 544.

Appendix A

In the instant action, DM does not explicitly admit that it affirmatively required Ryco to distribute its records throughout the foregoing territory. However, DM does admit, via deposition testimony of DM's president Mark Watson, that his understanding was that DM's recordings would be distributed nationwide, "in all 50 states" pursuant to the parties' agreement. J.A. 71. The language in the DM-Ryco agreement is nearly identical to that in *Tobin*, and viewing the facts in a light most favorable to Appellants, the Court finds that the foregoing supports a prima facie purposeful availment finding.[11]

b. DM's website and internet sales

As further support for a finding of purposeful availment, Bridgeport notes that DM operates a website, dmrecords.com, through which users can access DM's catalog and purchase DM's records. Through the DM site, users select a recording of choice and then are redirected to Amazon.com to complete their purchases.

As indicated *supra*, "operation of an Internet website can constitute the purposeful availment of the privilege of acting in a forum state under the first *Mohasco* factor 'if the

11. The distinction that the Court finds between DM and NTW is twofold. First, no contract language is presented to the Court as to the NTW-RAL distribution agreement. Second, Bridgeport does not set forth sufficient facts as to NTW to find that NTW actually required RAL or any other party to market, distribute, or license NTW's compositions nationally, in Tennessee specifically, or elsewhere. If such is the nature of the relationship between NTW and RAL, that fact is not discernible from the record before the Court.

website is interactive to a degree that reveals specifically intended interaction with residents of the state.' " *Bird*, 289 F.3d at 874 (quoting *Neogen*, 282 F.3d at 890). In *Bird*, the court concluded "that by maintaining a website on which Ohio residents can register domain names and by allegedly accepting the business of 4,666 Ohio residents, the Dotster defendants have satisfied the purposeful-availment requirement." *Id.* The defendants in *Bird* operated a website through which users could register domain names and the plaintiff merely seized on defendants' admission that they processed 333,333 Internet domain-name registrations. Plaintiffs then estimated a number of sales that were likely to have occurred in Ohio. According to Bird, 70% of the defendants' sales occurred in the U.S. Bird then divided the 70% of the 333,333 sales equally among the 50 states, which resulted in the conclusion that 4,666 transactions involved an Ohio resident. Specifically noting that it "must draw all permissible inferences in favor of Bird at this stage of the proceedings, because no evidentiary hearing or discovery has occurred," *id.* at 872, the *Bird* court regarded the foregoing "evidence" as sufficient to establish purposeful availment.

In the instant action, as in *Bird*, there is evidence indicating the volume of business DM conducts through the internet for at least two of the allegedly infringing albums, *i.e.*, 36 internet sales of Tag Team and 30 of Future Rhythm. The facts are not clear regarding the number of Amazon.com sales that might have originated by linking through the DM website, but viewing the cumulative facts in Appellants' favor, we conclude that Bridgeport has adduced evidence sufficient to support a prima facie finding of purposeful availment.

4. Remaining Mohasco factors

Although Appellants urge us to proceed beyond the district court's purposeful availment analysis and announce that jurisdiction is proper, we decline to do so in the instant action. The remaining two prongs of the *Mohasco* test often implicate a fact-intensive analysis, and the appellate record is not sufficiently developed to permit us to determine, relative to each of the eight individual actions asserted against DM, whether DM's activities in the forum state are sufficiently related to each of the actions to support personal jurisdiction. This matter is more appropriately determined by the district court on remand.

III. CONCLUSION

Based on the foregoing, we **AFFIRM** the district court's order granting NTW's motion to dismiss for lack of personal jurisdiction. However, we **REVERSE** the district court's purposeful availment determination as to DM and **REMAND** appellate Case Nos. 02-5227—02-5234 for further findings as to the propriety of exercising specific personal jurisdiction over DM.

APPENDIX B — MEMORANDUM OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION ENTERED JANUARY 18, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

NO. 3:01-0707
JUDGE CAMPBELL

BRIDGEPORT MUSIC, INC., et al.

v.

STILL N-THE WATER PUBLISHING, et al.

MEMORANDUM

Pending before the Court is the motion of defendants N-The Water Publishing, Inc. and N-The Water Publishing, Inc. d/b/a Still N-The Water Publishing (collectively, "NTW") to dismiss for lack of personal jurisdiction or, alternatively, for improper venue (Docket No. 3). For the reasons set forth below, the motion to dismiss for lack of personal jurisdiction is GRANTED without prejudice, and the motion to dismiss for improper venue is DENIED as moot.

This case is one of several hundred[1] filed by plaintiffs against various defendants in which plaintiffs allege that the

1. Plaintiffs originally filed one, massive complaint against almost eight hundred defendants alleging close to five hundred causes

(Cont'd)

defendants, all entities and/or individuals associated with the "rap" or "hip-hop" music industry, have infringed upon plaintiffs' copyrights in several sound recordings and musical compositions by "sampling" these recordings and/or compositions in subsequent recordings, compositions and performances. The First Amended Complaint (Docket No. 2) alleges copyright infringement arising out of the composition titled "Aggravated Monkeys" on the sound recording "Secrets of the Hidden Temple," which plaintiffs allege contains an infringing "sample" of the composition "Good Old Music."[2]

FACTS

NTW is a Texas corporation with its principal place of business in Texas. NTW claims that there is no basis for asserting personal jurisdiction over it in Tennessee because (1) NTW has never maintained any place of business or substantial presence in Tennessee; (2) NTW does not regularly market, sell, license or otherwise regularly conduct

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(Cont'd)

of action. *Bridgeport Music, Inc. v. 11C Music*, Case No. 3:01-0412 (M.D. Tenn. 2001). The Court severed the case by count into 476 surviving cases (the "Bridgeport Cases"), including the instant case, by Order dated July 25, 2001 (Case No. 3:01-0412, Docket No. 349).

2. Plaintiffs have alleged copyright infringement against NTW in ten other Bridgeport Cases (3:01-0749, 3:01-0750, 3:01-0860, 3:01-0869, 3:01-0881, 3:01-0905, 3:01-0964, 3:01-1093, 3:01-1094, and 3:01-1128), each involving a different allegedly infringing composition that was released on one or more sound recordings distributed by defendant Rap-A-Lot Records, Inc.

business in Tennessee; (3) NTW has entered into only one contract that could be construed as having been entered into or consummated in Tennessee; and (4) NTW has never maintained a registered agent for service of process in Tennessee. Memorandum of Law in Support of Motion to Dismiss for Lack of Personal Jurisdiction or, Alternatively, for Improper Venue ("NTW's Memorandum") at 9-10 (Docket No. 4).

In response, plaintiffs allege that NTW, a music publishing company, has directly and indirectly transacted business in Tennessee by: (1) licensing its musical compositions to be included in sound recordings sold in Nashville, Tennessee; (2) collecting royalties from sales of its compositions in Nashville, Tennessee; (3) licensing performances of its compositions in Tennessee; and (4) licensing one composition to be synchronized in a movie that was released, distributed, sold and is available to rent in Tennessee. Plaintiffs' Response to the Motion to Dismiss for Lack of Personal Jurisdiction or, Alternatively, for Improper Venue of N-The Water Publishing, Inc. d/b/a N-The Water and Still N-The Water ("Plaintiffs' Response") at 1-2 (Docket No. 22). In relation to the subject of these lawsuits, plaintiffs allege that NTW has infringed on plaintiffs' copyrights through "sampling" of its compositions and has participated in the distribution of the infringing compositions and/or sound recordings in Tennessee, thereby committing torts and causing tortious injury in Nashville, Tennessee (Docket No. 22 at 2).

Appendix B

Plaintiffs' jurisdictional allegations in the First Amended Complaint do not provide any factual basis for assertion of jurisdiction, as they recite no facts specific to NTW or any acts or omissions of NTW upon which jurisdiction may be based (Docket No. 2, ¶ 17). However, the Federal Rules of Civil Procedure do not require plaintiffs to plead any facts alleging personal jurisdiction in their complaint. Wright & Miller, Fed. Practice and Procedure: Civil 2d § 1363, at 458 (West 1990). The Court must look, then, to plaintiffs' submissions in response to NTW's motion[3] to see if plaintiffs have asserted facts sufficient to establish a prima facie showing of jurisdiction.

In their Statement of Facts (Docket No. 23), plaintiffs allege that:

- NTW is a music publisher whose three main sources

3. Plaintiffs' Response dated Nov. 2, 2001 (Docket No. 22); Statement of Facts in Support of Plaintiffs' Response to the Motion for Lack of Personal Jurisdiction or, Alternatively, for Improper Venue of N-The Water Publishing, Inc. d/b/a N-The Water and Still N-The Water dated Nov. 2, 2001 ("Statement of Facts") (Docket No. 23) and exhibits thereto; Transcript of the July 23, 2001 deposition of Bruce Toval (Docket No. 23, Ex. A); Declaration of Kerry Flanagan executed on July 23, 2001 (Docket No. 23, Ex. B); Affidavit of Billie Lowe sworn to Nov. 2, 2001 (Docket No. 23, Ex. C); and Plaintiffs' Additional Filing Concerning Defendant Still N-The Water Publishing's Motion to Dismiss for Lack of Personal Jurisdiction filed Nov. 30, 2001 ("Plaintiffs' Surreply") (Docket No. 36).

of income are mechanical royalties,[4] performance royalties[5] and synchronization royalties[6] (¶¶ 5, 20);

- NTW does business as both N-The Water Publishing (which is affiliated with ASCAP) and Still N-The Water Publishing (which is affiliated with BMI) (¶¶ 8-9);

- NTW granted a mechanical license to Rap-A-Lot Records, Inc. ("RAL") for the allegedly infringing composition to be included in a sound recording released by RAL, from which NTW has received royalty income (¶¶ 23-24, 49);

- RAL is a nationally distributed record label, and NTW understood that RAL intended to sell the sound recordings containing NTW's musical compositions on a nationwide basis (¶¶ 42-45);

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4. A mechanical license is a license from the copyright holder for use of its composition in a sound recording in return for payment of a royalty; royalties are usually paid each time a copy of the sound recording is sold. Statement of Facts, ¶¶ 22-23, 25-26 (Docket No. 23).

5. Performance royalties are earned when a composition is played on the radio, in business or service establishments, or at live concerts. Statement of Facts, ¶ 81 (Docket No. 23).

6. A synchronization license is a license for use of a composition in a film, pre-recorded radio or television program, or radio or television commercial. 2 LINDEY ON ENTERTAINMENT, PUBLISHING AND THE ARTS § 7.01 (2d ed. 2000); Statement of Facts, ¶ 93-94 (Docket No. 23).

Appendix B

- RAL is an affiliate of NTW – RAL was wholly owned prior to 1996 by James Price (who wholly owned NTW prior to 1994), RAL's office is located at the same address as NTW's, RAL licenses 85% of NTW's compositions, and RAL pays less than the statutory royalty rate for those licenses (¶¶ 11-12, 15-16, 27, 34);

- RAL advertises its sound recordings on a national basis, including in national magazines, radio spots, newspaper ads and national TV ads, and "probably" advertised some of the sound recordings containing allegedly infringing compositions (¶¶ 52-54);

- RAL's sound recordings that contain allegedly infringing compositions are available for sale in Nashville, Tennessee (¶¶ 57-59);

- NTW is affiliated with the American Society of Composers Authors & Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI"), performing rights organizations that administer licenses with third parties for live performances nationwide of NTW's compositions, collect licensing fees from these performances and remit them to NTW, and police performances by bringing suit against third parties for unauthorized performances (¶¶ 82-89);

- Both ASCAP and BMI have offices in Nashville, Tennessee (¶ 83);

- BMI and ASCAP license NTW compositions to third parties in Tennessee, including the allegedly infringing compositions (¶ 91);

- NTW has licensed one of the allegedly infringing compositions, "Having Thangs,"[7] for synchronization in the nationally released film "Dangerous Minds," for which NTW received a flat fee of around $20,000 (¶¶ 95-96);

- The film "Dangerous Minds" is available for sale and rental in Nashville, Tennessee, and was released in movie theaters in Nashville, Tennessee (¶¶ 99-100);

- In 1998, NTW entered into a contract with Bluewater Music Co., a Tennessee company, to monitor NTW publishing interests in foreign markets (¶¶ 101-102);

- The sound recordings containing the allegedly infringing compositions are available for sale over the Internet (¶ 105).

The question for the Court is whether the foregoing facts provide a sufficient basis for this Court to assert personal jurisdiction over NTW.

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7. "Having Thangs" is the subject composition in Bridgeport Case No. 3:01-0881.

Appendix B

ANALYSIS

I.

Standard

On a motion to dismiss for lack of personal jurisdiction, plaintiffs have the burden of setting forth specific facts in support of the Court's exercise of personal jurisdiction over the moving defendants. *Theunissen v. Matthews*, 935 F.2d 1454, 1458 (6th Cir. 1991). Plaintiffs cannot rely solely on the allegations pleaded in their complaint. *Id.*

The Sixth Circuit has clearly defined the procedure and standards for determining personal jurisdiction. *See Dean v. Motel 6 Operating L.P.*, 134 F.3d 1269, 1271-1272 (6th Cir. 1998) (citing *Serras v. First Tennessee Bank Nat'l Ass'n*, 875 F.2d 1212, 1214 (6th Cir. 1989)). The district court may determine the motion on the basis of affidavits alone; it may permit discovery in aid of the motion; it may conduct an evidentiary hearing on the merits of the motion, or it may reserve its decision until trial. *Serras*, 875 F.2d at 1214. Plaintiffs may defeat the motion by making a prima facie showing of jurisdiction in their pleadings and affidavits, which must be considered by the court in a light most favorable to plaintiffs. *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1262 (6th Cir. 1996). This burden changes if the court chooses to hold an evidentiary hearing; plaintiffs must then establish jurisdiction by a preponderance of the evidence. *Id.* If the court chooses to rule on the motion without conducting an evidentiary hearing, it "does not weigh the controverting

assertions of the party seeking dismissal."[8] *Id.* (quoting *Theunissen*, 935 F.2d at 1459). The Sixth Circuit has determined that "[a]ny other rule would empower a defendant to defeat personal jurisdiction merely by filing a written affidavit contradicting jurisdictional facts alleged by a plaintiff." *Serras*, 875 F.2d at 1214. "Dismissal in this procedural posture is proper only if all the specific facts which the plaintiff [] alleges collectively fail to state a prima facie case for jurisdiction." *CompuServe*, 89 F.3d at 1262. If the defendant's written submissions raise disputed issues of fact or require determinations of credibility, the court may exercise its discretion to hold an evidentiary hearing, or may reserve the issue for trial. *Dean*, 134 F.2d at 1272.

Because this action raises a federal question, the Court must analyze the personal jurisdiction issue pursuant to Rule 4(k) of the Federal Rules of Civil Procedure, which requires this Court to consider whether jurisdiction over the defendant is consistent with the specific requirements of Tennessee's long-arm statute and constitutional principles

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8. NTW has filed a Reply Memorandum in which it challenges some of the factual assertions made by plaintiffs. Memorandum of Law in Support of NTW's Reply to the Plaintiffs' Response to NTW's Motion to Dismiss for Lack of Personal Jurisdiction or, Alternatively, for Improper Venue ("NTW's Memorandum") at 3 (Docket No. 31). Because the Court has chosen to rule on the parties' written submissions, it cannot give weight to any of NTW's controverting assertions. *CompuServe*, 89 F.3d at 1262. NTW's Reply Memorandum also raises the issue that plaintiffs did not reply to NTW's Request for Admissions in the time allowed (Docket No. 31 at 2). Plaintiffs' response was filed with the Court on Nov. 30, 2001, as Exhibit A to its Surreply (Docket No. 36). The Court finds that no prejudice to NTW has occurred from the late response.

of due process. *See, e.g., Mitchell v. White Motor Credit Corp.*, 627 F. Supp. 1241, 1246 (M.D. Tenn. 1986). Under Tennessee's long-arm statute, jurisdiction may be asserted on "[a]ny basis not inconsistent with the constitution of this state or of the United States." TENN. CODE. ANN. § 20-2-214(a)(6).[9] This subsection has been interpreted to extend to the limits of personal jurisdiction imposed by the Due Process Clause. *Payne v. Motorists' Mutual Ins. Cos.*, 4 F.3d 454, 455 (6th Cir. 1993).[10]

The Supreme Court has held that personal jurisdiction over a defendant comports with the Due Process Clause where that jurisdiction stems from "certain minimum contacts with [the forum] such that maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Calder v. Jones*, 465 U.S. 783, 788, 104 S. Ct. 1482, 1486, 79 L. Ed. 2d 804 (1984) (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 158, 90 L. Ed. 95 (1945)).

Personal jurisdiction may be general or specific depending on the nature of the contacts in a particular case. *Compuserve*, 89 F.3d at 1263. General jurisdiction exists "when a defendant has 'continuous and systematic contacts with the forum state

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9. *See also* TENN. CODE. ANN. § 20-2-223.

10. The Court's Due Process analysis is governed by the Fifth Amendment of the United States Constitution instead of the Fourteenth Amendment in a federal question case such as this one; however, the standards to be applied under the Fifth Amendment are essentially the same as those applicable under the Fourteenth Amendment. *See, e.g., Dakota Inds., Inc. v. Dakota Sportswear, Inc.*, 946 F.2d 1384, 1389 n.2 (8th Cir. 1991).

sufficient to justify the state's exercise of judicial power with respect to any and all claims.'" *Aristech Chemical Int'l Ltd. v. Acrylic Fabricators Ltd.*, 138 F.3d 624, 627 (6th Cir. 1998) (quoting *Kerry Steel v. Paragon Indus.* Inc., 106 F.3d 147, 149 (6th Cir. 1997)). Specific jurisdiction, on the other hand, subjects the defendant "to suit in this forum state only on the claims that 'arise out of or relate to' a defendant's contacts with the forum.'" *Id.*

The Sixth Circuit has established three criteria to be used in determining whether specific jurisdiction exists in a particular case:

> First, the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must arise from the defendant's activities there. Finally, the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable.

Payne, 4 F.3d at 455 (quoting *Southern Machine Co. v. Mohasco Indus., Inc.*, 401 F.2d 374, 381 (6th Cir. 1968)). The "purposeful availment" requirement is "the *sine qua non* of *in personam* jurisdiction." *Mohasco Indus.*, 401 F.2d at 381-82. It is satisfied "when the defendant's contacts with the forum state 'proximately result from actions by the defendant himself that create a "substantial connection" with the forum State,' and when the defendant's conduct and

connection with the forum are such that he 'should reasonably anticipate being haled into court there.'" *CompuServe, Inc.*, 89 F.3d at 1263 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474-74, 105 S. Ct. 2174, 2183-84, 85 L. Ed. 2d 528 (1985)). A defendant should not be haled into a jurisdiction where his contacts are random, fortuitous, or attenuated. *Id.* Plaintiffs argue that NTW is subject to both general and specific jurisdiction.

Venue

In addition to its jurisdictional challenge, NTW also argues that venue is not proper in the Middle District of Tennessee. The venue provision of the Copyright Act provides that "[c]ivil actions, suits, or proceedings arising under any Act of Congress relating to copyrights . . . may be instituted in the district in which the defendant or his agent resides or may be found." 28 U.S.C. § 1400(a). It is widely accepted that, for the purposes of this venue provision, a defendant is "found" wherever personal jurisdiction can be properly asserted against it. *Linzer v. EMI Blackwood Music, Inc.*, 904 F. Supp. 207, 214 (S.D.N.Y. 1995). Therefore, if NTW is subject to the personal jurisdiction of this Court, then venue would properly lie in this District. *Walker v. Concoby*, 79 F. Supp. 2d 827, 835 (N.D. Ohio 1999).

II.

NTW Does Not Have Systematic And Continuous Contacts with Tennessee

In arguing for assertion of general jurisdiction over NTW, plaintiffs point to activities of RAL (Docket No. 22 at 9-12).

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In order to attribute RAL's activities to NTW for the purposes of jurisdiction, plaintiffs must show that RAL is either an agent or alter ego of NTW. Plaintiffs' assertions, however, fall short of showing the existence of either relationship. *See Hospital Underwriting Group, Inc. v. Summit Health Ltd.*, 791 F. Supp. 627, 633 (M.D. Tenn. 1989) (essential test under Tennessee law for existence of agency relationship is right of control); *In re Telectronics Pacing Systems, Inc.*, 953 F. Supp. 909, 918-920 (S.D. Ohio 1997) (facts alleging alter ego relationship for purposes of jurisdiction must indicate either attribution (instigation of local entity's activities by foreign entity) or merger (ownership, control or integrated management)).

Plaintiffs allege that RAL is an affiliate of NTW for several reasons (Docket No. 23, ¶¶ 14-19). From 1992 to 1994, both entities were wholly owned by James Prince; Mr. Prince sold his interest in NTW to his wife in 1994, and sold his interest in RAL to Noo-Trybe Records in 1996 (Docket No. 23, ¶¶ 11-12, 15-16). Plaintiffs have not indicated whether the period of common ownership coincides with the dates of alleged acts of infringement, so as an initial matter, the Court cannot determine whether the period of common control is at all relevant to this action. Because plaintiffs do not allege that Mr. Prince continues to control both entities, there is no basis to find attribution between NTW and RAL. *See Telectronics*, 953 F. Supp. at 918. Additionally, plaintiffs have not alleged sufficient indicators of merger – e.g., interchange of personnel, exchange of documents and records, or any acts by NTW and RAL that indicate they are part of the same entity – to support a finding of an alter ego relationship. *See Telectronics*, 953 F. Supp.

at 919. Plaintiffs have alleged that NTW and RAL operate at the same location, that NTW licenses most of its compositions to RAL, and that RAL pays favorable royalty rates to NTW (Docket No. 23, ¶¶ 18, 27, 34). The Court concludes that these allegations of merger between NTW and RAL are not sufficient to justify attributing RAL's activities to NTW for jurisdictional purposes. *Cf. Telectronics*, 953 F. Supp. at 919 (association between entities "deep and wide-ranging and evidences 'undue control'"). Because plaintiffs have not made any allegations that NTW exerts control over RAL, RAL is not an agent of NTW and there is no basis for attributing any of RAL's activities to NTW for jurisdictional purposes. *See Hospital Underwriting*, 791 F. Supp. at 633.

Plaintiffs' allegations regarding NTW's contacts with Tennessee do not rise to the level of "continuous and systematic contacts" and therefore there is no basis to assert general jurisdiction. *Aristech*, 138 F.2d at 627. Plaintiffs assert that the activities of ASCAP and BMI in Tennessee can be imputed to NTW for the purposes of jurisdiction because ASCAP and BMI are essentially agents of NTW. (Docket No. 22 at 8-10). The cases cited by plaintiffs in support of this proposition – *In re Magnetic Audiotape Antitrust Litigation*, 99 Civ. 1580, 2001 U.S. Dist. LEXIS 5160, *15 (S.D.N.Y. Feb. 20, 2001); *Top Form Mills, Inc. v. Sociedad Nationale Industria Applicazioni Viscosa*, 428 F. Supp. 1237, 1242 (S.D.N.Y. 1977); and *Gelfand v. Tanner Motor Tours, Ltd.*, 385 F.2d 116, 120-121 (2d Cir. 1967) – are clearly distinguishable from the facts presented here. ASCAP and BMI are alleged to be performance rights organizations, not music publishers (Docket No. 23, ¶¶ 82). ASCAP and BMI

provide only licensing services to NTW. In order to assert an agency relationship from which jurisdiction can be imputed, based on the case law cited by plaintiffs, plaintiffs would have to show that ASCAP'S and BMI's activities here are the same as NTW's would be if NTW had a Tennessee office – i.e., they would be performing the functions of a music publishing company in Tennessee. No such showing has been made. *See Magnetic Audiotape*, 2001 U.S. Dist. LEXIS 1560 at *15 (non-resident defendant not involved in magnetic audiotape business during relevant period, therefore subsidiaries could not have been doing what non-resident defendant would do if subsidiaries did not exist). The Court concludes that the activities of ASCAP and BMI cannot be imputed to NTW for the purposes of establishing jurisdiction. *See also R.L. Lipton Distrib. Co. v. Dribeck Importers, Inc.*, 811 F.2d 967, 970 (6th Cir. 1987) (conduct and contacts of independent distributor over which non-resident defendant had little, if any, control not attributed to defendant); *Hospital Underwriting*, 791 F. Supp. at 633.

Of plaintiffs' remaining assertions of contacts between NTW and Tennessee – NTW has entered into one contract with Bluewater, a Tennessee company, NTW has received royalties from sales of sound recordings containing its compositions in Tennessee and over the Internet, and NTW has granted a synchronization license for use of one of its compositions in a nationally distributed film – only the Bluewater contract arguably shows NTW purposefully availing itself of the benefits of doing business in Tennessee. However, merely entering into one contract with a Tennessee company does not amount to "continuous and systematic contacts." *See State Indus., Inc. v. Beckett Gas, Inc.*, 200

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F.R.D. 392, 397 (M.D. Tenn. 2001) (single fact that defendant sold some products to some Tennessee residents insufficient to establish general jurisdiction), and cases cited therein. Therefore, the Court declines to exercise general jurisdiction over NTW.

III.

Plaintiffs' Assertions Fail To Establish that NTW Purposefully Availed Itself of this Forum

In order for this Court to assert specific jurisdiction over NTW, plaintiffs must establish the following three criteria: (i) NTW must be shown to have purposefully availed itself of the privilege of acting in Tennessee or causing a consequence in Tennessee; (ii) the cause of action must arise from NTW's activities here; and (iii) the acts of NTW or consequences caused by it must have a substantial enough connection with Tennessee to make the exercise of jurisdiction over the defendant reasonable. *Payne*, 4 F.3d at 455. Plaintiffs have failed to establish that NTW has purposefully availed itself of this forum, and therefore NTW is not subject to the specific jurisdiction of this Court. *Conti v. Pneumatic Products Corp.*, 977 F.2d 978, 982 (6th Cir. 1992).

"The most authoritative formulation of the [purposeful availment] requirement . . . has been provided by the Supreme Court: 'it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *International Tech.*

Consultants, Inc. v. Euroglas, S.A., 107 F.3d 386, 395-396 (6th Cir. 1997) (quoting *Burger King*, 471 U.S. at 475, 105 S. Ct. at 2183).

Plaintiffs argue that NTW has purposefully availed itself of the privilege of doing business in Tennessee by entering into a contract with Bluewater,[11] and by entering into contracts with national record companies, national movie companies, and ASCAP and BMI to supply its compositions to Tennessee to earn the maximum amount of profits from Tennessee. Plaintiffs cite three cases in support thereof: *Linzer v. EMI Blackwood Music*, 904 F. Supp. at 214; *Triple A Partnership v. MPL Communications, Inc.*, 629 F. Supp. 1520, 1524 (D. Kan. 1986); and *Gray v. St. Martin's Press*, 929 F. Supp. 40, 48 (D.N.H. 1996). The Court does not find these cases to be persuasive as to NTW's purposeful availment of this forum.

In *Linzer*, the plaintiffs were songwriters who claimed copyright interests in a collection of songs performed by the musical group The Four Seasons and brought an action against the group in the district court for the Southern District of New York. 904 F. Supp. at 211. In deciding whether jurisdiction existed over two individual members of the group under New York's long-arm statute, the *Linzer* court analyzed whether the individual defendants' contacts satisfied the requirements of that statute, but it did not perform a separate

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11. Plaintiffs have not alleged that the Bluewater contract has any connection to the alleged acts of infringement in this action. NTW's Reply Memorandum at 3 (Docket No. 31). Therefore, this contact with Tennessee cannot be used as a basis of assertion of specific jurisdiction. *Payne*, 4 F.3d at 455.

due process analysis as required in this Circuit. *See CompuServe*, 89 F.3d at 1263 ("crucial federal constitutional inquiry" is whether non-resident defendant has sufficient contacts; citing three criteria of purposeful availment, cause of action arising from activities in forum, and substantial connection of defendant's activities to forum). The *Linzer* court determined that the individuals' contracts with two licensing agencies *located in New York* that conducted their activities, including passing on royalties to the individuals, *in New York*, were sufficient to satisfy the requirements of "transacting business" in New York under the long-arm statute. *Id.* at 213. The court relied on the holding in *Greenky v. Irving Music, Inc.*, 217 U.S.P.Q. 750 (S.D.N.Y. 1981), where the court found that "by soliciting services of *New York* licensing agents for the licensing and promotion of the Songs in this state and throughout the nation, a party contracts to sell its goods or services here and thus exposes itself to the jurisdiction of New York courts" (emphasis added). *Id.* at 214.

Here, plaintiffs have not shown that NTW's contracts with ASCAP or BMI provide for the provision of services *in Tennessee*, and while both ASCAP and BMI maintain offices in Tennessee, they are New York corporations[12] and plaintiffs have proffered no facts to support the conclusion that their activities on behalf of NTW, including collecting and delivering royalty payments to NTW, are performed here as opposed to New York or elsewhere. Therefore, this Court does not find the reasoning in *Linzer* to be dispositive as to activities of all licensing agencies, and, without any

12. NTW's Memorandum at 7 (Docket No. 4).

Tennessee-specific facts in the record, declines to attribute ASCAP's or BMI's activities to NTW as purposeful availment. *State Indus.*, 200 F.R.D. at 396.

The *Linzer* court also found that the individual defendants were alleged to have committed several tortious acts that brought them within the ambit of New York's long-arm statute. 904 F. Supp. at 214. One of those torts was copyright infringement, which, under New York law, is a commercial tort deemed to have occurred at the point of consumer purchase. *Id.* (citing *Lipton v. The Nature Co.*, 781 F. Supp. 1032, 1036 (S.D.N.Y. 1992)). Plaintiffs claim that another basis for specific jurisdiction to be asserted against NTW is that NTW is alleged to have committed the commercial tort of copyright infringement in Tennessee (Docket 22 at 18-19).

Whether copyright infringement is a commercial tort for the purposes of Tennessee's long-arm statute appears to be an open question. Compare *Lipton*, 781 F. Supp. at 1036 (non-resident defendant that commits copyright infringement through sales by independent brokers or retail agents subject to jurisdiction under tortious act provision of New York's long-arm statute), with *Selle v. Gibb*, No. 78 C 3656, 1979 U.S. Dist. LEXIS 10623, *12-13 (N.D. Ill. Aug. 2, 1979) (cause of action against record company for copyright infringement does not arise from company's telephone solicitation of orders for infringing sound recording in Illinois). Neither party cites Sixth Circuit or Tennessee case law on this issue. NTW cites *Ham v. La Cienega Music Co.*, 4 F.3d 413 (5th Cir. 1993), as standing for the proposition that allegations of distribution and exploitation of a

defendant's copyrights within the forum are not sufficient bases for a finding of jurisdiction (Docket No. 4 at 14-18). NTW, however, misstates the holding in that case. The Fifth Circuit found that the plaintiff had "presented evidence that these efforts have borne fruit in Texas" and thus connected the defendants to Texas under the Fifth Circuit's stream of commerce cases. *Id.* at 416. However, the Fifth Circuit upheld dismissal of the declaratory judgment action for lack of jurisdiction on the basis that the plaintiff had failed to show a sufficient nexus between the cause of action and defendants' exploitation activities: "resolution of this action depends solely upon whether [plaintiff's composition] infringed copyrights owned by [defendants]. Exploitation of the 'Boogie Chillen' copyrights by the defendants in no way relates to the merits of that question." *Id.*

The question remains, therefore, whether in the Sixth Circuit activities amounting to exploitation of an allegedly infringing copyright within the forum state are sufficient contacts by themselves to satisfy the purposeful availment requirement of the due process inquiry. This Court concludes that, without a showing of any additional conduct directed towards the state, mere generalized exploitation of a copyright in the stream of commerce does not amount to purposeful availment. To find otherwise would mean that a copyright infringement defendant would be subject to personal jurisdiction in any forum in which a copy of the allegedly infringing work was ultimately sold by others without the defendant taking any further acts directed at that forum. Such a broad rule would amount to a judicial rewriting of the Copyright Act to provide for nationwide service of process (*see Johnson v. Tuff N Rumble Management, Inc.*,

Civ. No. 99-1374, 1999 U.S. Dist. LEXIS 19574, *10 (E.D. La. Dec. 14, 1999) (no nationwide service of process under Copyright Act)), and is contrary to the Sixth Circuit's approach to stream of commerce cases. *See Tobin v. Astra Pharm. Products, Inc.*, 993 F.2d 528, 542-544 (6th Cir. 1993) (adopting "stream of commerce plus" approach advanced by O'Connor plurality opinion in *Asahi Metal Inds. Co. v. Superior Court*, 480 U.S. 102, 112, 107 S. Ct. 1026, 1032 (1987)); *CompuServe*, 89 F.2d at 1265 (injection of product into stream of commerce "without more, would be at best a dubious ground for jurisdiction").

For the same reasons, the Court declines to follow the decision in *Triple A Partnership*, in which the district court interpreted Kansas's long-arm statute to extend jurisdiction over two music publishing companies whose only contacts with the forum were through the licensing activities of two performance rights organizations, an out-of-state licensing agency and the sale of sheet music by an out-of-state print publisher. 629 F. Supp. at 1521. First, the court's decision in *Triple A Partnership* is heavily dependent upon language in Kansas's long-arm statute that includes acts of a defendant's "agent or instrumentality" as basis for jurisdiction. *Id.* at 1522-1523. As discussed above, this Court has already ruled that the activities of RAL, ASCAP and BMI do not provide an independent basis for assertion of jurisdiction against NTW. Second, the *Triple A Partnership* court applied the stream of commerce theory for its due process analysis, reasoning that the defendant had delivered its product (the allegedly infringing work) into the stream of commerce by entering into licensing agreements and deriving revenues from sales of the song by the licensing agency and the print

publisher. *Id.* at 1524. In this Circuit, the mere act of placing goods into the stream of commerce is not a sufficient basis for jurisdiction without a showing of *additional conduct* directed at the forum that indicates purposeful availment. *Tobin* at 544. Because there was no showing of additional conduct in *Triple A Partnership*, this case does not comport with Sixth Circuit law. Finally, the plaintiff in that case was a Kansas resident, and the court noted that Kansas had an interest in protecting the proprietary interests of its residents. *Id.* at 1525. No such interest can be asserted here, where plaintiffs are not residents of Tennessee, nor do they have any other significant contact with this forum.

The Court finds that *Gray v. St. Martin's Press* also fails to support a finding by this Court of purposeful availment. 929 F. Supp. 40. *Gray* is a defamation case in which the district court in New Hampshire admitted that the "evidence of purposeful availment is not particularly strong" where the defendant author had no contacts with New Hampshire other than the contract with her publisher to distribute and sell the book nationally. *Id.* at 48. The court applied Justice O'Connor's "stream of commerce plus" theory (*Asahi Metal*, 480 U.S. at 112, 107 S. Ct. at 1032) and found that the author's contract with the publisher for national distribution of the book and her receipt of a royalty payment for each book sold provided the "additional conduct" needed and evidenced "an intent to serve every forum encompassed by the Contract, including the consumers of New Hampshire." *Id.* This Court does not find this reasoning persuasive.

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In the Sixth Circuit, the additional conduct element is not satisfied by a passive agreement to receive compensation if and when goods are sold in the forum. *See State Indus.*, 200 F.R.D. at 396, where the plaintiff in a patent infringement action made a stream of commerce argument based on its allegations that the non-resident defendant had sent the allegedly infringing gas burners into the state through an established distribution channel. The District Court ruled that the plaintiff's claim that the defendant had sold the burners with knowledge that heaters containing those burners would be sold in Tennessee was insufficient without any evidence "of purposeful action directed toward Tennessee" by the defendant. *Id.*; *see also Bailey v. Turbine Design*, 86 F. Supp. 2d at 795 (where jurisdiction was sought based on publication of allegedly defamatory statements on corporate defendant's website, plaintiff failed to show that defendants had any contacts with Tennessee other than website posting, or made any effort to "reach out to Tennessee residents, any more than to persons residing elsewhere"). These cases illustrate that in this Circuit, additional conduct requires a purposeful action directed at the state by the defendant in addition to placing its product in the stream of commerce. *See CompuServe*, 89 F.2d at 1264, 1265 ("There is no question that [defendant] himself took actions that created a connection with Ohio"; defendant both injected product into stream of commerce *and* entered into contract with plaintiff, an Ohio internet service provider).

In both their Response and Surreply, plaintiffs cite to *Editorial Musical Latino Americana v. MAR Internat'l Records, Inc.* where the district court found personal jurisdiction over a record label based on its distribution of the allegedly infring-

ing record to several stores in New York (Docket No. 22 at 13-14; Docket No. 36 at 3). The *Editorial Musical* court in its due process analysis did not look for any additional conduct with the State of New York, following Second Circuit law that has rejected the "stream of commerce plus" approach. 829 F. Supp. at 66. This case does not provide the Court with any guidance as to whether the facts alleged by plaintiffs amount to additional conduct under Sixth Circuit law.

Having found that plaintiffs have failed to show that NTW has purposefully availed itself of this forum, it is not necessary to determine whether plaintiff's showing fulfills the two remaining criteria for jurisdiction in this Circuit – that the cause of action arises from activities in the forum, and that a substantial connection exists between defendant's activities and the forum such that exercise of jurisdiction would be reasonable. *CompuServe*, 89 F.3d at 1263. Nor is it necessary to address defendant's arguments regarding improper venue.

For the foregoing reasons, the motion of defendants N-The Water Publishing, Inc. and N-The Water Publishing, Inc. d/b/a Still N-The Water Publishing to dismiss for lack of personal jurisdiction is GRANTED. Defendants' motion to dismiss for improper venue is DENIED as moot.

s/ Todd J. Campbell
TODD J. CAMPBELL
UNITED STATES DISTRICT JUDGE

APPENDIX C — STATUTE INVOLVED

TENNESSEE CODE ANNOTATED

TITLE 20. CIVIL PROCEDURE
CHAPTER 2. PROCESS
PART 2. LONG-ARM STATUTES

Tenn. Code Ann. § **20-2-214** (2003)

20-2-214. Jurisdiction of persons unavailable to personal service in state — Classes of actions to which applicable

(a) Persons who are nonresidents of Tennessee and residents of Tennessee who are outside the state and cannot be personally served with process within the state are subject to the jurisdiction of the courts of this state as to any action or claim for relief arising from:

(1) The transaction of any business within the state;

(2) Any tortious act or omission within this state;

(3) The ownership or possession of any interest in property located within this state;

(4) Entering into any contract of insurance, indemnity, or guaranty covering any person, property, or risk located within this state at the time of contracting;

(5) Entering into a contract for services to be rendered or for materials to be furnished in this state;

(6) Any basis not inconsistent with the constitution of this state or of the United States;

(7) Any action of divorce, annulment or separate maintenance where the parties lived in the marital relationship within this state, notwithstanding one party's subsequent departure from this state, as to all obligations arising for alimony, custody, child support, or marital dissolution agreement, if the other party to the marital relationship continues to reside in this state.

(b) "Person," as used herein, includes corporations and all other entities which would be subject to service of process if present in this state.

(c) Any such person shall be deemed to have submitted to the jurisdiction of this state who acts in the manner above described through an agent or personal representative.

No. 03-215

IN THE

Supreme Court of the United States

BRIDGEPORT MUSIC, INC.; SOUTHFIELD MUSIC, INC.; WESTBOUND RECORDS, INC.; and NINE RECORDS, INC.,

Petitioners,

v.

STILL N-THE WATER PUBLISHING and N-THE WATER PUBLISHING, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Respondents disagree with the Question Presented as articulated by Petitioners in their Petition for Writ of Certiorari.

The question presented is whether, in a case where all parties to the dispute are nonresidents of the forum state, a federal court may, in manner consistent with constitutional due process, assert personal jurisdiction over a nonresident defendant who granted a royalty-bearing license to a manufacturer of phonograph records who, in turn, injected the phonograph records into the stream of commerce and where allegedly copyright-infringing material was contained on phonograph records for retail sale in the forum state.

STATEMENT PURSUANT TO RULE 29.6

Neither Respondent has a parent company and no publicly held company owns 10% or more of the stock in either Respondent.

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STATEMENT OF THE CASE

Respondents generally agree with the procedural statements in the Petitioners' Statement of the Case, Petition at 2-7, but find that their Petition is replete with mis-characterizations and omissions of important substantive facts that bear upon the issues that would properly be before the Court should it choose to accept this case for review.

I. No Party Is a Resident of the Forum State

Bridgeport Music, Inc., Southfield Music, Inc., Westbound Records, Inc., and Nine Records, Inc. (collectively "Bridgeport") are Michigan corporations whose principal places of business are believed to be in Michigan. N-The Water Publishing, Inc., individually and d/b/a Still N-The Water Publishing (collectively "NTW") is a Texas corporation whose only place of business is in Texas.

In addition, there were other defendants in the litigation over whom the district court had personal jurisdiction. Bridgeport attempts to take advantage of their presence in attempting to show the propriety of jurisdiction over NTW, despite the fact that the other defendants are wholly separate and independent entities. The additional defendants include EMI Group, plc., a United Kingdom private limited company whose principal place of business is located in England; EMI Recorded Music, an Illinois corporation whose principal place of business is in California; EMI Music Distribution, an Illinois corporation whose principal place of business is in California; Virgin Records America, Inc., a Delaware

corporation whose principal place of business is in California; Noo Trybe Records, Inc. d/b/a Rap-A-Lot Records ("Rap-A-Lot"), a Delaware corporation whose principal places of business were in California and Texas; and Hollywood Pictures Corporation, a California corporation with its principal place of business in California.

Two entities whose relationship with NTW Bridgeport considers important for jurisdictional purposes are: The American Society of Composers, Authors, & Performers, Inc. ("ASCAP"), a New York corporation with its principal place of business in New York; and Broadcast Music, Inc. ("BMI"), a New York corporation with its principal place of business in New York. ASCAP and BMI are known in the music industry as "performing rights societies" or "performing rights organizations" ("PROs").[1] ASCAP and BMI each maintain an office in the forum of the litigation, the Middle District of Tennessee (Nashville).

II. Structure of the Music Business

In its Petition Bridgeport fails to explain critical differences in the functions of a music publisher, a recorded music company, and a distributor. A music publisher ("publisher") owns "musical works,"[2] commonly referred to

1. A "'performing rights society' [also called a "performing rights organization"] is an association, corporation, or other entity that licenses the public performance of non-dramatic musical works on behalf of copyright owners of such works, such as the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and SESAC, Inc." 17 U.S.C. § 101 (2003). NTW is not affiliated with SESAC, Inc.

2. "Musical work" is not defined in the Copyright Act of 1976, as amended. *See* H.R. Rep. No. 94-1476, at 55-56 (1976) ("Of the

(Cont'd)

as "compositions," for the purpose of commercially exploiting them for financial gain. All publishers grant mechanical licenses to recorded music companies (typically called "record labels") for the purpose of authorizing the record label to incorporate the compositions into one or more "master" sound recordings.[3] The record label duplicates the master sound recording in the form of phonograph records[4], *e.g.*, compact discs, cassette tapes, etc. The record label delivers the phonograph records to a "distributor," who, as its name says, distributes phonograph records to retail outlets. Consumers purchase phonograph records from retail outlets.

(Cont'd)

seven items listed, four are defined in section 101. The three undefined categories –'musical works,' 'dramatic works,' and 'pantomimes and choreographic works'– have fairly settled meanings."). Generally speaking, a musical work, or "composition," is a particular sequence and arrangement of music and/or lyrics that comprise what is commonly referred to as a "song."

3. "'Sound recordings' are works that result from the fixation of a series of musical, spoken, or other sounds . . . regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied." 17 U.S.C. § 101 (2003).

4. "'Phonorecords' are material objects in which sounds . . . are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. . . ." 17 U.S.C. § 101 (2003).

The publisher is entitled to a "mechanical royalty"[5] for each phonograph record containing a publisher-licensed composition that is sold by the record label's distributor to a retailer. Resp. Opp. App. at 12a. Mechanical royalties are paid by the record label to the publisher. Resp. Opp. App. at 12a. Publishers are also entitled to "performance royalties" for each time one of their compositions is publicly performed, *e.g.*, on the radio, on television, over a jukebox, etc. Performance royalties are paid by the PROs to the publisher. Resp. Opp. App. at 15a.

Importantly, once a publisher licenses a composition to a record label, the publisher ceases to have any further control over how – or whether – the composition is commercially exploited. Resp. Opp. App. at 18a-20a, 22a. Stated differently, if the record label chooses to record, duplicate, and secure a distributor to distribute phonograph records containing licensed compositions, the publisher does nothing except (1) passively receive mechanical royalties from the record label, and (2) passively receive performance royalties from PROs. *See* Resp. Opp. App. at 18a-20a, 22a. Simply put, a publisher is not involved in deciding whether to deliver phonograph records into the stream of commerce. Resp. Opp. App. at 18a-20a, 22a.

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5. A "mechanical royalty" is the royalty paid for each sound recording sold.

III. Mis-Characterized & Omitted Facts

A. Bridgeport Attempts to Impute to NTW Conduct of Others in Tennessee

The Court has emphasized in its personal jurisdiction decisions that it is the defendant's *own contact* with the forum state that serves as the measuring stick for minimum contacts analyses. *See, e.g., Burger King v. Rudzewicz*, 471 U.S. 462 (1985). Bridgeport, however, tries to impute to NTW the purposeful contacts with Tennessee of unrelated entities such as Rap-A-Lot, EMI Manufacturing and EMI Music Distribution to satisfy the constitutional requirement that the defendant itself purposefully directed conduct toward Tennessee. NTW has *itself* taken no action directed toward and made no intentional contact with the forum state.

To the contrary, NTW's only conduct was the granting of copyright licenses and passive receipt of revenue (and very limited marketing that did not take place in and was not directed toward any resident of Tennessee). Resp. Opp. App. at 1a-4a, 18a-19a, 23a-25a. For NTW, the decisions to grant copyright licenses, and the negotiation and drafting thereof, would have taken place only in Texas, California, and/or New York. No such conduct would have taken place in Tennessee or with a Tennessee resident.

Bridgeport recognizes these facts and is thus forced to characterize NTW as being involved in the manufacturing, marketing, distribution, and selling processes in order to bootstrap the non-forum-related conduct of NTW to the activities of the manufacturer, marketer, distributor, and seller that were purposefully directed to Tennessee. With an understanding of the interrelationship between the separate entities performing distinct functions within the music industry, NTW identifies the following perceived misstatements of fact in Bridgeport's Petition.

B. Rap-A-Lot is Not "NTW's Record Label"

Bridgeport characterizes Rap-A-Lot as "NTW's record label." Pet. at 2. This characterization is misleading. Rap-A-Lot is a wholly-owned subsidiary of Virgin Records America, Inc., which, in turn, is a subsidiary of EMI Recorded Music North America, which, in turn again, is a subsidiary of the EMI Group, plc., a United Kingdom private limited company whose stock is publicly-traded in the United Kingdom on London's FTSE stock exchange and in the United States on the NASDAQ's OTC exchange. By characterizing Rap-A-Lot as "NTW's record label," Bridgeport attempts to create the perception that NTW owns an interest in one or more of the companies responsible for creating sound recordings (Rap-A-Lot). Such is not the case. Resp. Opp. App. at 2a, 6a-10a. NTW has never owned any part of Rap-A-Lot. Resp. Opp. App. at 10a.

C. NTW Does Not Own a Distributor, Does Not Engage in Distribution, & Does Not Engage in Marketing in the Forum

Bridgeport seeks to impute the conduct of the separately-owned record label and distributor to NTW by portraying NTW as (1) either owning the distributor, or being involved in the actual distribution of phonograph records in the forum state; and (2) marketing in the forum. For example, Bridgeport asserts that NTW is engaged in the business of "distributing the infringing compositions and sound recordings. . . ." Pet. at 2; *see also* Pet. at 6. Bridgeport redoubles its efforts later in the Petition when it erroneously asserts that it "established through the presentation of evidence" that "NTW and its distributor market in Tennessee."

Bridgeport knows that NTW does not own any distributor, and Bridgeport knows that, as a publisher, NTW does not distribute compositions or sound recordings and does not market in the forum state. Resp. Opp. App. at 2a, 6a-10a, 13a-15a, 23a-25a. Bridgeport also knows NTW's marketing efforts are limited to mailing previously-recorded versions of its compositions to film studios or production companies who may wish to include an NTW composition in an upcoming motion picture, and nothing in the record indicates that any such marketing was directed at Tennessee or one of its residents. Resp. Opp. App. at 3a. NTW engages in no other marketing or advertising. Resp. Opp. App. at 3a.

D. Bridgeport Established Nothing By "Presentation of Evidence in the District Court" Because the District Court Did Not Hold an Evidentiary Hearing

On page 24 of its Petition Bridgeport writes that it established "through the presentation of evidence in the district court that NTW purposefully directed conduct to Tennessee. . . ." Bridgeport's statement is incorrect: the district court did not make any evidentiary findings. Pet. App. at 7a ("The district court granted the parties a limited time to conduct jurisdictional discovery, but did not conduct a hearing on either NTW or DM's motions to dismiss."); Pet. App. at 34a n.8 ("Because the Court has chosen to rule on the parties written submissions, it cannot give any weight to NTW's controverting assertions.").

Trying to capitalize on the fiction of evidentiary findings, Bridgeport makes the following misstatements of fact. First, Bridgeport writes that "NTW granted the rights to distribute sound recordings . . . in Tennessee." Pet. at 24. NTW does not own any rights in any sound recordings.

Resp. Opp. App. at 8a-9a. NTW cannot grant rights it does not possess. Second, Bridgeport asserts that "NTW granted distribution rights. . . ." Pet. at 24. The products that were distributed are phonograph records made from sound recordings owned by the record labels. The entity owning the rights to (1) duplicate the sound recordings into phonograph records, and (2) distribute the phonograph records containing the sound recordings is the record label, Rap-A-Lot, not NTW. Resp. Opp. App. at 12a-13a. Third, Bridgeport inaccurately asserts that NTW receives performance royalties from ASCAP and BMI for the compositions at issue in this case. Pet. at 24. NTW's corporate representative testified that NTW had never received any royalties from either ASCAP or BMI in connection with the subject compositions. Resp. Opp. App. at 15a.

E. NTW Does Not Own or Operate an Internet Website

Bridgeport further attempts to manufacture for NTW contacts with the forum state by implicitly characterizing NTW as selling sound recordings over the Internet. Pet. at 7. Bridgeport again fails to appreciate the role of a publisher. NTW does not create sound recordings or manufacture phonograph records. Resp. Opp. App. at 12a. NTW does not engage in marketing or sales of phonograph records. Resp. Opp. App. at 19a. Most importantly in the context of Bridgeport's argument, NTW does not own or operate an Internet website. Resp. Opp. App. at 11a, 18a.

F. Affiliation as Publisher-Member With a PRO is a Practical Requirement to Engage in the Music Publishing Business

Next, Bridgeport relies upon NTW's affiliation with ASCAP and BMI as a publisher-member in support of its claim that jurisdiction is proper. To that end, Bridgeport points out that NTW licenses its entire catalog of compositions to ASCAP and BMI; that ASCAP and BMI license those compositions for public performances to third parties; and that ASCAP and BMI monitor the public performances of the compositions and collect performance royalties due NTW for such performances.

Bridgeport fails to inform the Court, however, that *every* publisher is required, as a practical matter, to license its entire catalog of compositions to a PRO, and there are only three of them in existence: ASCAP, BMI, and SESAC. A brief summary of the PROs' functions explains why publishers must affiliate with them. The business of the PROs may be divided into three categories: (1) issuing "blanket" licenses to third parties for public performances; (2) monitoring third parties to determine how frequently compositions are played; and (3) collecting the royalties owed for each public performance and paying the publisher its share of the performance royalties. PROs accomplish the monitoring tasks through the use of various statistical sampling and survey models, and various electronic tracking programs. Simply put, only the PROs are equipped to conduct the services required to monitor and collect performance royalties. As a practical matter, NTW is required to affiliate with a PRO. It is significant, in the context of this case, that NTW chose not to affiliate with SESAC, which is headquartered in Tennessee, the forum state. Finally, the fact that ASCAP and BMI have offices in Tennessee is merely a fortuitous circumstance over which NTW has no control.

G. Bluewater Agreement Raised for First Time on Appeal

Lastly, Bridgeport raises the issue of a foreign administration agreement that NTW executed with Bluewater Music Co. d/b/a Mighty Nice Music on or about December 1, 1998 ("Bluewater Agreement"). Pet. at 7. Bridgeport raised the issue of the Bluewater Agreement for the first time on appeal and the Sixth Circuit declined to address the issue.

REASONS FOR DENYING THE PETITION

There are four reasons the Court should deny Bridgeport's Petition. First, Bridgeport essentially seeks a rule whereby a publisher who licenses a composition to be embodied in a master sound recording that is duplicated in a phonograph record and distributed to a forum state "in effect appoint[s] the chattel his agent for service of process" such that its "amenability to suit would travel with the chattel," namely, the phonograph record. The Court already rejected this type of argument in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), and there is no reason the Court should reconsider its position.

Second, while there is a split among the circuits in determining whether to follow the O'Connor or Brennan approach in *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987), only one appellate court – the Sixth Circuit – has unequivocally and expressly chosen one of the standards as the more appropriate rule. Pet. App. at 14a. The Court should wait for further concrete development in the decisions of the circuit courts before addressing the stream of commerce issue again.

Third, Bridgeport essentially asks the Court to judicially legislate a personal jurisdiction standard based on a "national contacts" theory specifically for the music industry. In support of its implicit request, Bridgeport argues that a music copyright infringement plaintiff cannot obtain relief in a single forum. Its argument is incorrect: under the Copyright Act of 1976, 17 U.S.C. §§ 101, *et seq.*, a plaintiff may obtain complete relief from a single copyright defendant in a single jurisdiction because each defendant is jointly and severally liable for such infringement. Moreover, plaintiffs who have causes of action against multiple defendants have no constitutional right to sue all in the same forum.

Fourth, the Petition should be denied because, NTW asserts, jurisdiction would not be proper under *either* the "pure" stream of commerce test espoused by Justice Brennan, or the stream of commerce "plus" test articulated by Justice O'Connor in *Asahi*. Bridgeport argues that the Court should accept this case because, it contends, jurisdiction would be proper under Justice Brennan's approach. In *Asahi*, Justice Brennan wrote that "[t]he stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products *from manufacture to distribution to retail sale*." *Asahi*, 480 U.S. at 117 (emphasis added). As a publisher, NTW is not involved in either the manufacturing, distribution, or retail sales processes. Resp. Opp. App. at 6a-10a.

I. MISSTATEMENTS OF LAW

A. DEVELOPING TRENDS IN STREAM OF COMMERCE THEORY IN THE CIRCUIT COURTS

Bridgeport maintains that, since *Asahi*, the federal courts of appeal have become "deeply divided" in their analyses of when a federal court may assert personal jurisdiction over a nonresident defendant. Specifically, Bridgeport states that the circuits have struggled with determining whether a defendant who has placed goods in the stream of commerce has purposefully availed itself of the privilege of conducting activities in the forum state.

NTW acknowledges that the circuits do not have a uniform approach to these very fact-specific determinations. A careful review of the decisions cited by Bridgeport and other cases, however, shows that the nature of the conflict is not such that plenary review by the Court is warranted in this case. Most circuits have thus far avoided expressly choosing between the "pure" stream of commerce and stream of commerce "plus" tests, and the Sixth Circuit's decision may in fact represent the beginning of a trend. NTW proposes that it would be appropriate for the Court to wait until other circuits have more decisively addressed the issue to determine whether there is a trend toward adopting one of the tests.

1. FIRST CIRCUIT COURT OF APPEALS

The First Circuit Court of Appeals effectively rejected the "pure" stream of commerce test prior to *Asahi*. *Boit v. Gar-Tec Products, Inc.*, 967 F.2d 671, 682 (1st Cir. 1992) (citing *Dalmau Rodriguez v. Hughes Aircraft Company*, 781 F.2d 9 (1st Cir. 1986)). The First Circuit has continued using its pre-*Asahi* test, and has effectively adopted Justice O'Connor's approach. *Rodriguez v. Fullerton Tires Corp.*, 115 F.3d 81 (1st Cir. 1997); *Sawtelle v. Farrell*, 70 F.3d 1381, 1393 (1st Cir. 1995).

2. Second Circuit Court of Appeals

In its most recent opportunity to adopt either Justice O'Connor's or Justice Brennan's theory, the Second Circuit Court of Appeals declined to make a choice because the facts of the case met the more stringent O'Connor standard. *Kernan v. Kurz-Hastings, Inc.*, 175 F.3d 236, 244 (2nd Cir. 1999). The Second Circuit appears to believe that Justice Brennan's broad stream of commerce approach might be limited to products liability cases. *Kernan*, 175 F.3d at 244 ("Justice Brennan's concurring opinion . . . would have established a 'stream of commerce' standard in products liability cases. . . .").

3. Third Circuit Court of Appeals

The Third Circuit Court of Appeals' most recent opportunity to choose one of the stream of commerce approaches articulated in *Asahi* came in 1998 in *Pennzoil Products Co. v. Colelli & Associates, Inc.*, 149 F.3d 197 (3d Cir. 1998). The Third Circuit also declined to adopt either approach. *Id.* at 207 ("regardless of whether one applies the O'Connor standard or the Brennan standard, Colelli purposefully availed itself of the laws of Pennsylvania. . . . Consequently, we remand the case to the district court without adopting one position or the other on the issue of minimum contacts based on the stream-of-commerce theory.").

Moreover, in a pre-*Asahi* decision, the Third Circuit questioned whether the stream of commerce theory could appropriately be applied to a patent infringement case, *i.e.*, infringement of intellectual property. *Max Daetwyler Corp. v. Meyer*, 762 F.2d 290, 299 n. 12 (3rd Cir. 1985) ("Where, as here, plaintiff is also a multistate actor and where, unlike a products liability case, there is no showing of particularly localized harm, it is questionable whether the same tolerance

for broad jurisdiction is reasonable."). The Third Circuit has not squarely addressed the issue of whether stream of commerce theory should be applied at all in the intellectual property infringement context.

4. Fourth Circuit Court of Appeals

Bridgeport erroneously delineates the current state of stream of commerce theory in the Fourth Circuit Court of Appeals. The Fourth Circuit implicitly adopted Justice O'Connor's test in *Lesnick v. Hollingsworth & Vose Co.*, 35 F.3d 939, 944-945 (4th Cir. 1994). In doing so, first the court reconciled the distinctions between *World-Wide Volkswagen* and *Asahi*, writing:

> [w]hile *World-Wide Volkswagen* has been cited for the proposition that personal jurisdiction may follow a product if it is delivered "into the stream of commerce with the expectation that [it] will be purchased by consumers in the forum state," we read the holding of the case to be much narrower, requiring purposeful activity on the part of the defendants to establish a meaningful contact with the forum state.

Lesnick, 35 F.3d at 944-945. Further, "[n]otwithstanding the breadth of this 'stream of commerce' language, the entire opinion [of *World-Wide Volkswagen*] indicates that the Court has not abandoned the notion that jurisdiction must rest on a person's activity *deliberately directed toward the forum state*." *Lesnick*, 35 F.3d at 944-945 (emphasis in original). Consequently, the Fourth Circuit concluded, a plaintiff "cannot rely simply upon the 'stream of commerce' logic to establish jurisdiction." *Id.*

Bridgeport's citation to *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707 (4th Cir. 2002), Petition at 9, does not bear upon the issues that would be before the Court because it does not involve stream of commerce theory. The quotation offered by Bridgeport relates to the complexities of safeguarding a defendant's due process rights in the face of ever-evolving technology, *e.g.*, asserting jurisdiction based on a nonresident defendant's use of the Internet. *ALS Scan*, 293 F.3d at 711. The case before the Court does not involve the defendant's use of the Internet because the defendant does not maintain a presence on the Internet. Resp. Opp. App. at 11a.

5. Fifth Circuit Court of Appeals

The Fifth Circuit followed a test analogous to Brennan's approach prior to the Court's *Asahi* decision. *See, e.g., Bean Dredging Corp. v. Dredge Technology Corp.*, 744 F.2d 1081 (5th Cir. 1984). Although the Fifth Circuit has declined to depart from its pre-*Asahi* precedents in products liability cases, *see Ruston Gas Turbines, Inc. v. Donaldson Co., Inc.*, 9 F.3d 415, 419-420 (5th Cir. 1993), in its most recent stream of commerce decision the Fifth Circuit noted that it has expressly chosen not to extend Justice Brennan's test to copyright or contract cases. *Nuovo Pignone, SpA v. STORMAN ASIA M/V*, 310 F.3d 374, 381 (5th Cir. 2002) (citing *Ham v. La Cienega Music Co.*, 4 F.3d 413, 416 (5th Cir. 1993) (copyright case) and *Alpine View Co. Ltd. v. Atlas Copco AB*, 205 F.3d 208 (5th Cir. 2000) (contract case)). Bridgeport's blanket assertion that the Fifth Circuit "follow[s] the reasoning of Justice Brennan's plurality opinion in *Asahi*. . . " is an overstatement.

6. Sixth Circuit Court of Appeals

The Sixth Circuit Court of Appeals expressly adopted Justice O'Connor's approach in the case now before the Court.

7. Seventh Circuit Court of Appeals

Bridgeport informs the Court that the Seventh Circuit's analysis in *Dehmlow v. Austin Fireworks*, 963 F.2d 941 (7th Cir. 1992) is "especially insightful" and regards the case as a vigorous rejection of Justice O'Connor's approach. Pet. at 10. Bridgeport fails to acknowledge, however, that the Seventh Circuit remarked that it decided the case under Justice Brennan's position because that was the law in the circuit before *Asahi* and, because *Asahi* did not produce a majority opinion, the Seventh Circuit declined to depart from its precedents. In fact, the *Dehmlow* Court also acknowledged that the more stringent test articulated by Justice O'Connor was met under the facts of that case. *Dehmlow*, 963 F.2d at 947.

Moreover, it is questionable whether the Seventh Circuit would choose to apply the stream of commerce theory at all to a nonresident defendant who merely grants a royalty-bearing license for intellectual property that is developed, marketed, and sold in the forum state by third parties. *Cf.*, *Purdue Research Foundation v. Sanofi-Synthelabo, S.A.*, 338 F.3d 773 (7th Cir. 2003) (although case was decided on other grounds, the Seventh Circuit cited without rebuke the district court's conclusion that stream of commerce theory could not be applied to resident of foreign nation who licensed patent rights to a wholly-owned subsidiary who, in turn, developed, manufactured, marketed, and sold the product in the forum state, reasoning that issuing a license "does not place any products into the stream of commerce. . . .").

8. Eighth Circuit Court of Appeals

The Eighth Circuit Court of Appeals decisions are not muddled as Bridgeport contends. Though the Eighth Circuit has not expressly adopted either O'Connor's or Brennan's model, in *Falkirk Mining Co. v. Japan Steel Works, Ltd.*, 906 F.2d 369, 376 (8th Cir. 1990), that court issued an opinion consistent with Justice O'Connor's approach and that circuit's pre-*Asahi* precedent, stating: "[li]ke the nonresident defendant in *Asahi*, appellees' placement of a product into the stream of commerce, without more, does not constitute an act of the defendant purposefully directed toward the forum State." *See also Soo Line R. Co. v. Hawker Siddeley Canada, Inc.*, 950 F.2d 526 (8th Cir. 1991) (rejecting the "national contacts" theory, the court pointed out that "minimum contact analysis does not permit contact with a market to substitute for contact with a forum.").

In 1991 the Eighth Circuit decided *Dakota Industries, Inc. v. Dakota Sportswear, Inc.*, 946 F.2d 1384 (8th Cir. 1991), a case that Bridgeport argues is inconsistent with *Falkirk*. *Dakota Industries* is not inconsistent with *Falkirk*; rather, it is distinguishable on its facts, facts that invited the application of the Court's "effects test" set forth in *Calder v. Jones*, 465 U.S. 783 (1984).

Bridgeport next argues that the Eighth Circuit's decisions in *Barone v. Rich Bros. Interstate Display Fireworks Co.*, 25 F.3d 610 (8th Cir. 1994) and *Clune v. Alimak AB*, 233 F.3d 538 (8th Cir. 2000) evidence an acceptance of Justice Brennan's stream of commerce approach and, thus, a more significant split among the circuits. Neither case overruled or criticized *Falkirk*, they simply distinguished it on the facts. *Clune*, 233 F.3d at 539 n.9 (explaining distinctions in *Falkirk*). In fact, in *Clune* the Eighth Circuit tacitly

recognized the viability of the O'Connor approach when the court said "[i]n the present case, [the defendant] did more than simply set product adrift in the international stream of commerce." *Clune*, 233 F.3d at 543. Closing the loop, in *Guinness Import Co. v. Mark VII Distributors, Inc.*, 153 F.3d 607 (8th Cir. 1998), the Eighth Circuit cited *Falkirk* with approval and distinguished *Barone* from the facts of *Guinness Imports* on the grounds that *Barone* was a personal injury products liability case whereas *Guinness Imports* was a commercial dispute.

9. Ninth Circuit Court of Appeals

Although it has not *per se* adopted either *Asahi* test, the Ninth Circuit hints at approval of Justice O'Connor's standard. *See Omeluk v. Langsten Slip & Batbyggeri A/S*, 52 F.3d 267, 271 (9th Cir. 1995)

> At least a majority and perhaps all the justices agreed in *Asahi* that jurisdiction cannot be founded on the mere presence of a product in the forum, where the product has not been marketed there, and its presence there is not part of the regular and anticipated flow of the of products from the manufacturer.

Cf., *Rano v. Sipa Press, Inc.* 987 F.2d 580 (9th Cir. 1993) (rejecting plaintiff's argument that a nonresident defendant in a copyright infringement case who "caused and profited from [the distributor's] grant of licenses of [the plaintiff's] photographs to magazine publications that he knew would be distributed in California" satisfied the "purposeful availment" and "arising out of" prongs of the minimum contacts analysis).

10. Tenth Circuit Court of Appeals

The Tenth Circuit Court of Appeals has not squarely addressed stream of commerce theory since *Asahi* was decided. In explaining the purposeful availment portion of the minimum contacts analysis in *Kuenzle v. HTM Sport-Und Freizeitgeräte A.G.*, 102 F.3d 453, 458 (10th Cir. 1996), however, the Tenth Circuit cited to Justice O'Connor's opinion without mention of the competing analysis articulated by Justice Brennan. Further, in reversing a district court's assertion of jurisdiction, the Tenth Circuit wrote in *OMI Holdings, Inc. v. Royal Ins. Co. of Canada*, 149 F.3d 1086, 1094-1095 (10th Cir. 1998) that the district court's "assertion of jurisdiction seem[ed] to be based entirely on foreseeability – a position at odds with the Supreme Court's directive that foreseeability alone is an insufficient basis on which to establish minimum contacts." *Id.* (citing *World-Wide Volkswagen*, 444 U.S. at 295).

11. Eleventh Circuit Court of Appeals

Although the Eleventh Circuit has not expressly adopted a particular stream of commerce test, that court clearly approves of and consistently applies Justice O'Connor's standard: "foreseeability required to exercise jurisdiction is 'not the ability to see that the acts of third parties may affect the forum, but rather that the [actor's] own purposeful acts will have some effect in the forum.'" *American Charities for Reasonable Fundraising Regulation, Inc. v. Pinellas County*, 221 F.3d 1211, 1216-1217 (11th Cir. 2000) (quoting *Madara v. Hall*, 916 F.2d 1510, 1517 (11th Cir. 1990)); *see also Associated Transport Line, Inc. v. Productos Fitosanitarios Proficol El Carmen, S.A.*, 197 F.3d 1070, 1075 (11th Cir.1999); *Madara*, 916 F.2d at 1519 ("By giving the interview, Hall did not appoint copies of the magazine as his

agent for service of process wherever a third party, the publisher, might choose to send those magazines."). *Cf.*, *World-Wide Volkswagen*, 444 U.S. at 296 ("Every seller of chattels would in effect appoint the chattel his agent for service of process. His amenability to suit would travel with the chattel.").

Bridgeport's citation to *Vermeulen v. Renault, U.S.A., Inc.*, 985 F.2d 1534 (11th Cir. 1993), is inapposite because jurisdiction there was based on the nationwide service of process provisions of the Foreign Sovereign Immunities Act of 1976 and FEDERAL RULE OF CIVIL PROCEDURE 4(k)(1)(d). *Vermeulen*, 985 F.2d at 1548. *Vermeulen* embraces circumstances not present in the case before the Court because the Copyright Act of 1976 does not authorize nationwide service of process.

12. DISTRICT OF COLUMBIA CIRCUIT COURT OF APPEALS

There appear to be no opinions from the District of Columbia Circuit Court of Appeals directly addressing stream of commerce theory since its 1981 decision in *Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distributors Pty. Ltd.*, 647 F.2d 200 (D.C. Cir. 1981). The District of Columbia District Court, however, considers Justice O'Connor's model a well-settled statement of law. *See, e.g.*, *Formica v. Cascade Candle Co.*, 125 F. Supp. 2d 552, 555 (D.D.C. 2001).

> Even if defendant put its candles into a national stream of commerce with the knowledge that they would reach the District, it is well-settled that "a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of

> placing the product into the stream into an act purposefully directed toward the forum State."

(citing and quoting Justice O'Connor's opinion in *Asahi*, 480 U.S. at 112).

13. Federal Circuit Court of Appeals

The Federal Circuit has thus far declined to adopt either of the *Asahi* plurality opinions. *Viam Corp. v. Iowa Export-Import Trading Co.*, 84 F.3d 424, 428 (Fed Cir. 1996) ("as in *Beverly Hills Fan*, we need not join the debate in *Asahi* as to which version of the stream of commerce theory is the correct one."); *Beverly Hills Fan Co. v. Royal Sovereign Corp.*, 21 F.3d 1558, 1566 (Fed. Cir. 1994) ("We need not join this debate here, since we find that, under either version of the stream of commerce theory, plaintiff made the required jurisdictional showing.").

Further, it is doubtful whether the Federal Circuit Court of Appeals would apply stream of commerce theory to a nonresident licensor of intellectual property. In *Red Wing Shoe Co., Inc. v. Hockerson-Halberstadt, Inc.*, 148 F.3d 1355 (Fed. Cir. 1998), a nonresident defendant owned certain patent rights and licensed them to a third party. The nonresident licensor's "sole business is licensing and enforcing the rights associated with two patents." *Red Wing*, 148 F.3d at 1357. Though the nonresident defendant's licensees had significant contact with the forum state, Minnesota, the Federal Circuit wrote that factor was "insufficient to submit [the nonresident defendant] to personal jurisdiction in the state" because "[i]n simple terms, doing business with a company that does business in Minnesota is not the same as doing business in Minnesota." *Red Wing*, 148 F.3d at 1361.

The Federal Circuit also flatly rejected an argument upon which Bridgeport relies heavily, finding that receipt of income from a royalty-bearing license from the forum state was irrelevant because it was only collaterally related to the forum: "[The nonresident defendant's] receipt of royalty income from its licensees for sales made in Minnesota is equally irrelevant. '[F]inancial benefits accruing to the defendant from a collateral relation to the forum State will not support jurisdiction if they do not stem from a constitutionally cognizable contact with that State.'" *Red Wing*, 48 F.3d at 1361-1362 (quoting *World-Wide Volkswagen*, 444 U.S. at 299).

II. Summary of Circuit Court Trends

Bridgeport urges that the Sixth Circuit's decision represents the "minority view within the post-*Asahi* jurisdictional analysis [sic] of most circuits. . . ." Pet. at 25. In support of its claim, Bridgeport contends that the First and Sixth Circuits have adopted O'Connor's standard; the Fourth Circuit "implicitly" applies Justice O'Connor' test; the Second, Third, Ninth, Eleventh and Federal Circuits have declined to adopt either of the *Asahi* plurality opinions; the Eighth Circuit has applied both models; and the District of Columbia and Tenth Circuits have not addressed the issue at all. Pet. at 8-12. In Bridgeport's estimation, the Fifth and Seventh Circuits follow Justice Brennan's approach. Pet. at 10. Even accepting Bridgeport's claims at face value one may not logically conclude that O'Connor's position is the minority view because only two of the 13 circuits would be considered to have adopted Justice Brennan's approach.

Bridgeport's declaration that the Sixth Circuit's opinion in the case before the Court "is certainly not in accord with the pre- and post-*Asahi* music copyright cases" is also fallacious. As an initial matter, assuming the cases to which it alludes are the four on pages 19-23, none of the cases cited therein are appellate court decisions. Second, the music copyright cases cited by Bridgeport are distinguishable on their facts or have been criticized or questioned by other courts as misstatements of law. *See, e.g., Bridgeport Music, Inc. v. Agarita Music, Inc.*, 182 F. Supp. 2d 653 (M.D. Tenn. 2002); *Fort Knox Music, Inc. v. Baptiste*, 139 F. Supp. 2d 505, 511 n.5 (S.D.N.Y. 2001).

Further, the following cases cited by Bridgeport are inapposite because they were decided using the *Calder* "effects test." *Calder*, 465 U.S. at 789-91; *Keeton v. Hustler Magazine*, 465 U.S. 770 (1984); *Dakota Indus.*, 946 F.2d 1384; *Gray v. St. Martin's Press, Inc.*, 929 F. Supp. 40 (D. N.H. 1996); *Johnson v. Tuff N Rumble Mgmt., Inc.*, No: 99-1374 Section: R(3); 1999 U.S. Dist. LEXIS 19574, at *4-5 (E.D. La. December 15, 1999). For the *Calder* effects test to apply in this case, Bridgeport would have had to have alleged and shown that NTW intentionally infringed Bridgeport's copyrights "for the very purpose of having [the] consequences felt in" Tennessee. *Dakota Indus.*, 946 F.2d at 1390-1391. Bridgeport made no such allegation or showing.

In sum, the Sixth Circuit Court of Appeals is the only appellate court to unequivocally and expressly adopt either of the *Asahi* standards by opting to make Justice O'Connor's standard the law in the Sixth Circuit. Pet. App. at 14a. On the other hand, no federal appellate court has expressly adopted the "pure" stream of commerce test espoused by Brennan. At this time, it is appropriate for the Court to wait and see if the Sixth Circuit is leading a judicial trend before again addressing the stream of commerce issue.

III. Bridgeport is Not Guaranteed the Right to Sue Multifarious Nonresident Defendants in Single Lawsuit in a Single Forum

Though not expressly stated by Bridgeport, one implication of its statement that the Sixth Circuit "ensured that a plaintiff alleging copyright infringement against music publishers and others from different states involved in the sale and distribution of an infringing composition cannot obtain relief in one legal proceeding filed in one federal forum," Petition at *i*, is that Bridgeport and other copyright infringement plaintiffs have a *right* to obtain relief in a single legal proceeding in one court. No such right is guaranteed by the United States Constitution or granted by the Copyright Act of 1976, 17 U.S.C. §§ 101, *et seq.*, as amended.

On the other hand, the Constitution and this Court's interpretation thereof *does* guarantee a nonresident defendant the right to due process before a federal court sitting in the forum state may assert jurisdiction over him or her. *See, e.g.*, U.S. Const. amend. XIV, § 1; *Asahi*, 480 U.S. 102; *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

CONCLUSION

Bridgeport's Petition should be denied. Bridgeport argues that the Court should take this opportunity to revisit *Asahi* to establish a uniform stream of commerce theory. NTW submits that it would be appropriate to wait and see if the Sixth Circuit's decision is the leading edge of a judicial trend. Further, Bridgeport implicitly seeks the formulation of a special rule of personal jurisdiction for the music industry, a standard based on "national contacts" that would essentially appoint phonograph records as "agents" for service of process. A similar rule was rejected in *World-Wide Volkswagen*. Finally, even under Justice Brennan's theory jurisdiction would be improper because as a licensor, not a manufacturer or seller, NTW did not inject any goods into the stream of commerce.

For these reasons and all others stated herein, NTW respectfully requests that this Honorable Court deny Bridgeport's Petition.

Respectfully submitted,

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APPENDIX

APPENDIX — EXCERPTS OF DEPOSITION TESTIMONY OF BRUCE TOVAL, NTW'S CORPORATE REPRESENTATIVE, DATED JULY 24, 2001

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

No. 3:01-0412[1]

BRIDGEPORT MUSIC, INC., et al,

Plaintiffs,

V.

11C Music, et al,

Defendants.

* * *

[Toval 15:19-17:15]

Q. Is there any other relationship between N-The Water Publishing and Virgin Records other than a source

---

1. This deposition was taken before the district court severed the original Case Number 3:01-0412 into 476 separate lawsuits on July 25, 2001. The severed district court Case Numbers in which Respondents were named as defendants include: 3:01-0707; 0749; 0750; 0860; 0869; 0881; 0894; 0895; 0964; 1093; 1094; 1128.

for musical compositions to be included on sound recordings released by Virgin Records?

A. No.

Q. Is there any other relationship between N-The Water Publishing and Noo Trybe Records, Inc. other than that N-The Water Publishing is a publishing company that licenses its musical compositions to be included on sound recordings released by Noo Trybe Records?

A. No.

Q. Does N-The Water Publishing act in the entertainment industry in any way other than as a Publisher?

A. No.

Q. Does it manage any artists?

A. No.

Q. Does it book any dates for artists?

A. No.

Q. Does it act as any type of agent for any artists?

A. No.

Q. Other than providing publishing services, does N-The Water publishing provide any other services — strike all that. Besides publishing and administration, does N-The Water Publishing provide any other services for song writers with which it is affiliated?

A. Other than publishing services, no.

Q. Does N-The Water Publishing undertake any form of advertising or marketing to encourage exploitation of its musical compositions?

A. Very limited.

Q. What exactly is the advertising or marketing activity that N-The Water Publishing undertakes?

A. Primarily, we'll mail copies of the songs to people that we hear about do movies.

Q. In other words, if you become aware that a film studio or a film production company is about to create a movie or might need music for inclusion in the movie, you will submit a copy of a previously recorded N-The Water musical composition for them to consider licensing?

A. Yes.

Q. Any other advertising or marketing type of activity that N-The Water undertakes with regard to its musical compositions?

A. No.

* * *

[Toval 23:2-24:17]

Q. And if we look at the United States, having a Rap-A-Lot record sold in more states rather than fewer states benefits N-The Water, correct?

A. Not necessarily.

Q. As a general rule, more states is going to mean more sales for Rap-A-Lot, correct? The more locations you're in, the more sales you're going to make?

MR. FASTHOFF: Objection. Asked and answered. He gave you his answer.

Q. (BY MS. DAVIS) You can answer that.

A. I really can't follow that.

Q. Sure. I'll ask it this way: The more locations where Rap-A-Lot Records are sold, the more likelihood there is of increased sales of Rap-A-Lot Records, correct?

A. If our type of customers are there, yes.

Q. As a result — understanding that you don't consider the states specifically but, as a general rule, N-The Water Publishing, like Rap-A-Lot, wants Rap-A-Lot Records in as many locations for sale as possible, correct?

A. That I really can't answer because there are just places that I know from personal knowledge of Rap-A-Lot, we just don't go.

Q. Do you want Rap-A-Lot Records sold in Tennessee? And when I say you, I mean N-The Water.

A. N-The Water? I'm not excluding any state. I'm just saying I can't include it.

MS. DAVIS: I'll object to that answer as nonresponsive.

Q. (BY MS. DAVIS) My question is this: You said there are certain places where N-The Water Publishing and Rap-A-Lot just don't want to go. My question to you is —

A. No. I said don't go.

Q. Don't go. Okay. Now, my question to you, does Rap-A-Lot Records sell records in the State of Tennessee?

MR. FASTHOFF: Objection. Calls for speculation.

Q. (BY MS. DAVIS) If you know. Only if you know.

A. I would be guessing.

* * *

[Toval 35:24-36:24]

Q. (BY MS. DAVIS) If you don't know, as a publisher, how your musical compositions get sold in Tower Records or Wherehouse Music, please, by all means, tell me that.

A. Well, you know, actually, I don't.

Q. Okay.

A. I can speculate.

Q. I don't want you to speculate. I want you to be clear. It is my understanding now of your testimony that you can't tell me the procedure by which a musical composition in which N-The Water Publishing owns the copyright would be sold on a sound recording in Nashville, Tennessee. You just would have to speculate to tell me that?

A. Since I don't work for the distributor and don't know their policies and procedures, I would have to speculate how they sold anything anywhere. All I can say is that I gave the right to someone to put it on wherever they put it and how they sell it to wherever they sell it is their own system.

Q. And you have no knowledge of the Rap-A-Lot manufacturing or distribution system, that's your testimony, Mr. Toval?

MR. FASTHOFF: Objection. Asked and answered.

A. Internal workings, no.

* * *

[Toval 39:10-40:15]

Q. (MS. DAVIS): The EMI Manufacturing & Distribution arm?

A. Yes.

Q. Correct.

A. I don't understand their internal workings. I don't understand how they solicit sales or who they solicit sales to. I do know that they solicit sales for products that I have licensed.

Q. And all I want to know is your understanding of how that happens. What happens? You sign a mechanical license as a publisher to a record company. What is your understanding of the chain of what happens next?

(MR. FASTHOFF): Objection. Calls for speculation.

Q. (MS. DAVIS): If you know. If you don't know, that's fine.

A. I'll give you my understanding because we don't need to go through this again. I sign a mechanical license for a record company, who in turn has a license deal with a manufacturer, who in turn has a — well, who also is tied to a distributor. Now, I assume, as you said, that they will sell as many records as possible. How they go to where they go to, I don't have the slightest idea. That would be my guess and as long as they help me sell as many as possible. So, I hope — I'm not trying not to answer your question. You ask me specific things

about specific workings and my honest answer is I don't know. You probably have people that work for you and as long as they get the job done within your parameters, you may not get the details. I don't always have all the details and you're asking me about details.

* * *

[Toval 43:19-44:1]

Q. What are the activities of N-The Water Publishing as a music publisher?

A. Primarily mechanical licensing and — well, actually, signing song writers, mechanical licensing and registering with performance rights. That makes up 90 to 95 percent of the work.

Q. And then collecting royalties, I would assume?

A. All that is included.

* * *

Appendix

[Toval 46:4-17]

Q. Who at Rap-A-Lot Records would be the person that I would need to talk to to determine how a musical composition from N-The Water Publishing would end up on a CD in a Wherehouse Music or a Tower Records in Nashville, Tennessee?

A. At Rap-A-Lot?

Q. Yes.

A. I don't think anybody at Rap-A-Lot could tell you.

Q. It's your understanding that nobody at Rap-A-Lot Records knows how their records get distributed to Tennessee or other states?

A. I think they would have to work for the distributor.

* * *

[Toval 48:11-13]

Q. Okay. Does N-The Water Publishing own any other companies or entities?

A. No.

* * *

Appendix

[Toval 50:3-5]

Q. Other than the Houston office, does N-The Water have any additional locations?

A. No.

* * *

[Toval 50:10-15]

Q. Does N-The Water Publishing have a Web site?

A. Not currently.

Q. Did it previously?

A. No, but futuristically.

Q. Do you know what the Web address is going to be?

A. No.

* * *

Appendix

[Toval 51:11-19]

Q. Now, a mechanical license is a license in which a publisher grants the right — to a record company the right to include a musical composition on a sound recording, correct?

A. Yes.

Q. And in return, the record company then pays something called mechanical royalties to that publisher that granted the mechanical license, correct?

A. Yes.

* * *

[Toval 53:11-54:4]

Q. And from the release date of those subject sound recordings, on the whole on the royalty bearing sales, Rap-A-Lot has in turn paid to N-The Water mechanical royalties on records sold, on the subject sound recording records sold?

A. Yes.

Q. The mechanical licenses that N-The Water Publishing has granted to Rap-A-Lot in the subject musical compositions have a territory that is the world or worldwide, correct? If you're confused by that, let me change my question.

A. I think it's domestic. I'm not —

Q. That's what I was going to ask. In the mechanical licenses that N-The Water has granted to Rap-A-Lot in the subject musical compositions, the territory of the mechanical license has been at least domestic, meaning the United States?

A. Yes.

* * *

[Toval 57:25-59:1]

Q. And you knew that Rap-A-Lot Records was going to attempt to sell the subject sound recordings containing the subject musical compositions nationally, correct?

A. Yes.

Q. Including Tennessee?

A. Can we stipulate — I don't know if I can even say that.

Q. You better ask your lawyer before you stipulate to anything. That's a term of art.

MR. FASTHOFF:We'll stipulate that Tennessee is a state of the U.S.

Q. (BY MS. DAVIS) If we can have an agreement that every time that something is attempted to be done nationally and you agree with that, that that would specifically include Tennessee, I will not have to add — that will cut this deposition in half.

A. Here's what we could do. We don't exclude any state. We attempt to market nationally. So, there is nothing to exclude Tennessee. Now, when I say — if I were to say it includes Tennessee, it's almost like saying we're doing something specific to include Tennessee. I don't exclude any state. So, you know, that's —

Q. So, understanding that you don't do anything special for Tennessee that you don't do for other states and to your understanding Rap-A-Lot Records doesn't do anything special —

* * *

Appendix

[Toval 61:14-17]

Q. Do you have any knowledge of the number of subject sound recordings sold in Tennessee from release until the present?

A. No.

* * *

[Toval 62:13-63:4]

Q. Do you know the dollar amount generated from sales of the subject sound recordings in Tennessee?

A. No.

Q. Do you know the dollar amount of mechanical royalties received by N-The Water as a result of sales of the subject sound recordings containing the subject musical compositions in the State of Tennessee?

A. No.

Q. Do you know the dollar amount of publisher performance royalties received by N-The Water from performances of the subject musical compositions in the State of Tennessee?

A. I believe zero.

Q. And why do you know that number and not the others?

A. Because on all of the songs listed, I don't think I've ever received any performance royalties.

* * *

[Toval 70:23-71:13]

Q. So, tell me if I have the procedure right. Once an artist finds a musical composition that he wants to record and maybe after he's recorded it, depending on what's happened, the record company comes to N-The Water and says, "We want to use one of your musical compositions on our sound recording," am I right so far?

A. Mostly in our cases, it's an original composition.

Q. For instance, the artist has written the composition and wants to include it on his own album?

A. Yes.

Q. So, the record company then comes to N-The Water and says, "The artist is going to include his song, you own the publishing in it, we need to get a mechanical license from you," correct?

A. Pretty much, yes.

* * *

Appendix

[Toval 74:23-75:4]

Q. Has N-The Water granted mechanical licenses to record companies other than Rap-A-Lot?

A. Yes.

Q. What other record companies?

A. There's several. I don't remember them all. Warner Brothers, Deaf Jam, Jive. I guess almost all the majors we've granted a license at one point or the other.

* * *

[Toval 76:3-14]

Q. If you were back at the office and I asked you to determine for me the amount of mechanical royalties N-The Water had received from sales of sound recordings containing its musical compositions in the State of Tennessee, would there be a way to do that?

A. Impossible.

Q. Why?

A. There's just no state-by-state information.

Q. The information given to N-The Water from Rap-A-Lot does not indicate the states that the different records were sold in; is that correct?

A. That's correct.

* * *

[Toval 84:2-6]

Q. Have you ever had any discussions with anyone concerning the sale of any of the subject sound recordings or subject musical compositions on the Internet?

A. No.

* * *

[Toval 85:3-22]

Q. Have you ever taken any action to ask cdnow not to sell your music on cdnow?

A. I don't think N-The Water could do that.

Q. Because?

A. We've licensed things to the record company, so, no, N-The Water — that's not something N-The Water could do.

Q. In fact, once N-The Water granted the mechanical license or the typical mechanical license it grants to Rap-A-Lot Records, including the ones it granted on the subject musical compositions, how that musical composition is exploited on record or sound recording is pretty much out of N-The Water's hands, correct?

A. Domestically.

Q. Yes.

A. Yes.

Q. That is within the discretion of the record company and 85 percent of time of the time that's Rap-A-Lot?

A. Within the parameters of the license, yes.

* * *

[Toval 86:14-18]

Q. Right. And, in fact, N-The Water understands it doesn't have the right to specify those channels, that that's something that the record company is going to do?

A. We never negotiated the right if that's what you mean, yes.

* * *

Appendix

[Toval 86:19-87:5]

Q. Do you have any understanding as to how the dollars that a consumer spends purchasing Rap-A-Lot sound recordings, particularly the subject sound recordings reflected in these deposition exhibits, how those dollars flow through the chain back to N-The Water?

A. I don't think they would.

Q. Why do you think that?

A. In a typical retail arrangement, as I understand it, whatever the consumer spends goes to the retail establishment. The retail establishment has already bought, based upon whatever the agreed upon wholesale price, that particular item from the distributor.

* * *

[Toval 87:19-88:3]

Q. When we talk about Wherehouse Music in Nashville, Tennessee, at what point in the chain of distribution is it your understanding N-The Water Publishing would be paid a mechanical royalty on the sale of Thugged Out that ultimately is sold in Wherehouse Music?

A. At the time Wherehouse Music purchases the CD.

Q. From Noo Trybe Records?

A. From Noo Trybe Records, obviously, with some stipulation of a reserve for returns.

* * *

[Toval 95:15-18]

Q. The movie Dangerous Minds, do you recall what the terms of the sync license for that Havin Thangs musical composition was?

A. Somewhere in the neighborhood of 20,000.

* * *

[Toval 96:25-97:3]

Q. Other than the $20,000 on the sync fee, are you paid any continuing royalties? Is N-The Water paid any continuing royalties?

A. No. A sync fee is a one time thing.

* * *

Appendix

[Toval 103:23-104:6]

Q. I understand that but there are third parties in Tennessee that have a license from N-The Water to perform the subject musical compositions, aren't there?

A. I don't know.

Q. You don't know if there's any third party that has a license to perform your works?

A. I don't have privy to who ASCAP and BMI license these things to. You would have better knowledge of that than me. Okay. I gave them a national license.

* * *

[Toval 106:5-16]

Q. (BY MS. DAVIS) When you granted the mechanical license to Rap-A-Lot Records to include the Havin Thangs on the Somethin' Serious sound recording, did you expect them to license the Still N-The Water musical composition Havin Thangs nationally?

MR. FASTHOFF: Objection. Mischaracterizes the facts. Asked and answered.

Q. (BY MS. DAVIS) You can answer.

A. Same answer.

Q. Which is yes, you did?

A. No, which is everywhere they can domestically.

Q. That's going to be my answer.

* * *

[Toval 107:15-16]

Q. You didn't expect for it to be nationally?

A. I sign a license and they do what they want with it.

* * *

[Toval 116:22-117:11]

Q. (BY MS. DAVIS) Has N-The Water ever taken out any newspaper ads?

A. Not that I recall.

Q. Placed any television ads?

A. No.

Q. Done any radio spots?

A. No.

Q. Been involved in any direct mail campaigns?

A. No.

Q. Participated in any advertising of record clubs?

A. No.

Q. Done any magazine advertising?

A. I don't think so.

Q. Any Internet advertising?

A. No.

* * *

[Toval 123:11-22]

Q. And, in fact, it says your initial affiliation [with ASCAP and BMI] was with the contact with Tennessee.

A. No. That's not how I read that and that's not how I interpret that.

Q. How do you interpret that?

A. The way I interpret that, if you want me to reword it, is my initial affiliation with ASCAP and BMI is

the only way that you can say I've had any contact with Tennessee because they have an office in Tennessee but I've never contacted that office, not once.

Q. You've never spoken to the office in Tennessee?

A. Not once.

* * *

[Toval 142:11-18]

Q. Does N-The Water have any input regarding any of the distribution agreements into which Rap-A-Lot enters?

A. No.

Q. Does it have any input into any of the manufacturing agreements into which Rap-A-Lot enters?

A. No.

* * * *

No. 03-215

IN THE

Supreme Court of the United States

BRIDGEPORT MUSIC, INC.; SOUTHFIELD MUSIC, INC.; WESTBOUND RECORDS, INC.; and NINE RECORDS, INC.,

Petitioners,

v.

STILL N THE WATER PUBLISHING and N-THE WATER PUBLISHING, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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STATEMENT PURSUANT TO RULE 29.6

Petitioners' Rule 29.6 Statement was set forth at page *ii* of the Petition for a Writ of Certiorari, and there are no amendments to that Statement.

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REPLY BRIEF

Petitioners accurately presented the pertinent case facts, procedural history, and state of the law on personal jurisdiction in asking this Court to provide further guidance in the wake of *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987). Respondent NTW fails to give this Court one sufficient reason to deny the Petition. NTW devotes more than half of its response agreeing with Petitioners that the federal courts are splintered in their attempts to reconcile *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), and *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), with the three plurality opinions in *Asahi*. Resp. Opp. at 10, 12-23. How Petitioners or Respondent choose to characterize the nature of the circuit split is beside the point. The undeniable fact remains that, sixteen years after *Asahi*, the courts of appeal have failed to reach consensus on the law of personal jurisdiction, and the time has come for this Court to exercise its discretion to resolve the quagmire.

The unsettled state of personal jurisdiction law is especially troublesome in intellectual property cases because copyright owners expect certainty and stability in the law in order to protect their valuable property interests. The muddled decisions of the courts of appeal have done little to assure certainty and stability in personal jurisdiction. The law changes from circuit to circuit, such that a copyright infringement case brought in the Fifth Circuit may be decided under the "stream of commerce" approach, *see Ruston Gas Turbines, Inc. v. Donaldson Co.*, 9 F.3d 415, 420 (5th Cir. 1993); *Ham v. La Cienega Music Co.*, 4 F.3d 413, 416 n.13 (5th Cir. 1993), while a copyright infringement case brought in the Sixth Circuit, like this one, is decided under the "stream

of commerce plus" approach. Where federal statutory rights under the Copyright Act are at stake, litigants should not have to meet a varying burden of jurisdictional proof depending upon the law of the circuit where a copyright lawsuit is brought.

Furthermore, the decision of the court of appeals below ensures that a copyright plaintiff alleging infringement against music publishers and related entities residing in different states that are involved in the sale and distribution of an infringing music composition cannot obtain relief in one legal proceeding filed in one federal forum. It is ironic that the result of the court's adoption of the "stream of commerce plus" approach directly contravenes *World-Wide Volkswagen's* admonishment that courts should take into consideration the interest of the states in the efficient judicial resolution of disputes. *Asahi*, 480 U.S. at 115 (O'Connor, J., plurality op.) Petitioners do not seek judicial legislation of a "national contacts" theory for the music industry. Resp. Opp. at 11. Rather, they seek efficient administration of justice under federal law.

Music publishers license the music compositions in their catalogs in a purposeful effort to achieve widespread distribution of them throughout the United States and the world to generate as much royalty income as possible. NTW's Chief Operating Officer, Mr. Toval, admitted this is precisely the objective he seeks to achieve in granting mechanical licenses for inclusion of music compositions on Rap-A-Lot Records and in licensing NTW's catalog with The American Society of Composers, Authors, & Performers, Inc. ("ASCAP"), and Broadcast Music, Inc. ("BMI"), for public performances and other uses by third parties. Resp. Opp. App. at 8a, 13a-14a, 22a-23a. NTW does not exclude any market because it is to NTW's financial advantage to sell compositions in every market. Resp. Opp. App. at 14a.

NTW's point that all music publishers must affiliate with ASCAP or BMI supports Petitioners' contention that the very nature of the music business—which thrives on widespread distribution of music throughout the states and the world—compels re-examination of personal jurisdiction principles that presently prevent copyright owners like Petitioners from enforcing their federally-protected rights.

Petitioners listed in the Petition at 24-25 the actions NTW has undertaken to assure that NTW music compositions find their way into every market, including the state of Tennessee. If NTW's conduct does not constitute purposeful availment of the forum under the stream of commerce theory, it is difficult to imagine what does. *See Triple A Partnership v. MPL Communications, Inc.*, 629 F. Supp. 1520, 1524 (D. Kan. 1986) ("[N]ormally the stream of commerce doctrine is applied to manufacturers of goods or component parts. But there is no logical reason why the doctrine should be restricted" in the music copyright context); *Chi-Lites v. San Juan Music Group, Ltd.*, 99 C 3393, 1999 U.S. Dist. LEXIS 17233 (N.D. Ill. 1999); *Johnson v. Tuff N Rumble Mgt., Inc.*, 99-1374, 1999 U.S. Dist. LEXIS 19574 (E.D. La. 1999); *Linzer v. EMI Blackwood Music, Inc.*, 904 F. Supp. 207, 213-14 (S.D.N.Y. 1995); *Doss v. Alabama*, No. 93-2438, 1994 U.S. Dist. LEXIS 6050 at *5-7 (D.D.C. 1994); *Editorial Musical Latino Americana v. Mar Int'l Records, Inc.*, 829 F. Supp. 62, 66 (S.D.N.Y. 1993); *Payne v. Kristofferson*, 631 F. Supp. 39, 41 (N.D. Ga. 1985); *Testa v. Janssen*, 482 F. Supp. 1195, 1197 (W.D. Penn. 1980). The protection of copyright, and uniform decisions under the Copyright Act, are paramount concerns of the federal judiciary. For these reasons, this Court should grant the Petition.

NTW's response offers little assistance in illuminating the question presented to the Court. NTW fails to address any of the music copyright cases Petitioners cited, Pet. at 13-23, other than to disparage them on the ground they were decided by district courts and to suggest, overbroadly and incorrectly, that the cases cited "have been criticized or questioned by other courts as misstatements of law[,]" citing *Bridgeport Music, Inc. v. Agarita Music, Inc.*, 182 F. Supp.2d 653 (M.D. Tenn. 2002); and *Fort Knox Music, Inc. v. Baptiste*, 139 F. Supp.2d 505, 511 n.5 (S.D.N.Y. 2001). Resp. Opp. at 23. The opinion in *Agarita Music, Inc.*, 182 F. Supp.2d at 662-65, discussed only *Linzer*; *Triple A Partnership*; and *Gray v. St. Martin's Press*, 929 F. Supp. 40 (D.N.H. 1996), and did not criticize these cases, but distinguished them on the facts. The district court in *Fort Knox Music*, 139 F. Supp.2d at 511 n.5, distinguished *Linzer* on the facts and otherwise did not mention other cases Petitioners cited in the Petition.

The Petition is not "replete with mis-characterizations and omissions of important substantive facts" or mis-statements of law. Resp. Opp. at 1, 12. Each point NTW makes is not relevant to consideration of the Petition or is without merit.

NTW's claims concerning parties do not affect consideration of the Petition. That Petitioners are not residents of Tennessee, Pet. at 2, does not affect the personal jurisdictional analysis. *See Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 775, 779 (1984) (observing focus is on defendant, forum and litigation, and plaintiff need not have minimum contacts with forum state).

Petitioners have not tried to take advantage of the fact that the district court asserted personal jurisdiction over other defendants. *See* Resp. Opp. at 1. Petitioners properly focus on NTW's conduct, and did not address other defendants because the information is not relevant to the question presented.

Nothing that NTW states about ASCAP and BMI contradicts the facts included in the Petition. Pet. at 7. Petitioners do not claim that ASCAP or BMI are parties to the litigation. Petitioners emphasize, however, that NTW initially licensed its entire music catalog with ASCAP and BMI through their Tennessee offices, ASCAP and BMI re-licensed NTW's music compositions for use by third parties, and ASCAP and BMI monitor performances, collect performance royalties, and engage in enforcement functions for their members, including NTW. Pet. at 7, 24-25.

NTW explains "the music business" from its point of view, Resp. Opp. at 2-4, relying in part on Mr. Toval's testimony. Resp. Opp. at 4 (citing Resp. Opp. App. 12a, 15a, 18a-20a, and 22a). There is nothing in NTW's explanation to support its erroneous accusation that Petitioners' facts attempt to mis-lead this Court.

In faulting Petitioners for "[trying] to impute to NTW the purposeful contacts with Tennessee of unrelated entities," NTW concedes important facts: (1) that Rap-A-Lot Records had "purposeful contacts with Tennessee" and (2) that "the activities of the manufacturer, marketer, distributor, and seller . . . were purposefully directed to Tennessee." Resp. Opp. at 5. These activities are precisely what NTW facilitates and intends will occur, and NTW itself purposefully directs activity to Tennessee. Pet. at 23-24.

Petitioners have not characterized NTW as directly involved in the manufacturing, distribution and selling processes, but rather have focused on NTW's conduct. Pet. at i, 2, 5-6.

NTW acknowledges that record labels pay mechanical royalties generated on sales of record albums to music publishers. Resp. Opp. at 4. Mr. Toval testified the record labels' exploitation of NTW's music compositions and payment of royalties earned must be accomplished within the parameters of the mechanical license granted. Resp. Opp. App. at 7a, 8a, 13a, 14a, 19a. Consequently, but for NTW's mechanical license, the record label could not legally include NTW's music composition on a sound recording and have it distributed for sale to consumers in the forum state. Similarly, but for the agreement between NTW and ASCAP and BMI, NTW's music compositions could not legally be performed or used by third parties in the forum state.

Petitioners agree with NTW that the district court did not hold an evidentiary hearing and did not make factual findings on the jurisdictional issue. Resp. Opp. at 7. Petitioners deny, however, that they have tried "to capitalize on the fiction of evidentiary findings[.]" Resp. Opp. at 7. In opposition to the motion to dismiss for lack of personal jurisdiction, Petitioners presented evidence, which the lower courts construed most favorably to Petitioners in accordance with controlling law, without considering Respondent's controverting assertions. Pet. App. A at 10a; Pet. App. B at 29a & n.3, 33a, 34a & n.8.

NTW complains that Petitioners portray NTW as granting to others the right to distribute sound recordings when NTW does not own any rights in sound recordings.

Resp. Opp. at 7-8. This is not correct. Petitioners stated that "*NTW granted rights to distribute sound recordings containing NTW's compositions*[.]" Pet. at 24 (emphasis added). Further, Petitioners stated "NTW granted distribution rights, knowing and expecting that the distributor would commercially exploit the recordings in Tennessee and throughout the nation[.]" Pet. at 24. Petitioners' statements are fully aligned with Mr. Toval's testimony. Resp. Opp. App. at 7a, 8a, 13a-14a, 16a.

Finally, NTW's remaining allegations regarding performance royalties, sales over the Internet, and the Bluewater Agreement are all without merit. Petitioners mis-stated nothing with regard to NTW's receipt of performance royalties. *Cf.* Pet. at 24 *with* Resp. Opp. at 8, 15a. Petitioners did not argue in the Petition that sales of NTW's compositions over the Internet or NTW's involvement in the Bluewater Agreement equate with minimum contacts. Petitioners merely explained how those issues were handled below. Pet. at 7, Pet. App. A at 21a; App. B at 32a, 40a.

In its survey of jurisdiction cases, Resp. Opp. at 12-22, NTW parrots most of the information included in the Petition, Pet. at 8-12, but repeatedly misinterprets the Petition and the cases. An illustrative example is the statement that "the Fifth Circuit noted that it has expressly chosen not to extend Justice Brennan's test to copyright or contract cases[,]" Resp. Opp. at 15, citing *Nuovo Pignone, SPA v. Storman Asia M/V*, 310 F.3d 374, 381 (5th Cir. 2002); *Ham*, 4 F.3d at 416, and *Alpine View Co. v. Atlas Copco AB*, 205 F.3d 208 (5th Cir. 2000). In *Nuovo Pignone*, 310 F.3d at 381, the court applied the stream of commerce theory in that contract case; in *Ham*, 4 F.3d at 416 & n.13, a copyright

declaratory judgment action, the court applied the stream of commerce theory, but dismissed for lack of a sufficient nexus between the cause of action and defendants' exploitation activities, noting it might reach a different result in a case alleging infringement of a song; and in *Alpine View*, 205 F.3d at 216, the court concluded it did not have to decide whether the theory applies in a broad range of cases. Much of NTW's remaining legal analysis is similarly suspect.

In any event, a few significant points must be made. It is not true, as NTW suggests, that the court of appeals' decision, issued in May 2003, marks the beginning of a trend. Resp. Opp. at 12, 23. Over ten years ago, the First Circuit noted: "Indeed those circuits that have squarely addressed the stream-of-commerce issue since *Asahi* have adopted Justice O'Connor's plurality view." *Boit v. Gar-Tec Prod., Inc.*, 967 F.2d 671, 683 (1st Cir. 1992). The Sixth Circuit has just now joined that camp; it is not setting a trend. Since 1987, the circuit courts have repeatedly attempted to reconcile *Asahi* with this Court's prior jurisdiction cases, and with existing law within the respective circuits. Pet. at 8-12; Resp. Opp. 12-22. Some even fail to recognize that Justice O'Connor's view represents a plurality of the Court. *See, e.g., Madara v. Hall*, 916 F.2d 1510, 1519 (11th Cir. 1990). Only this Court can clarify the law.

NTW notes that courts wonder whether the stream of commerce theory might be limited to products liability cases, Resp. Opp. at 13 (citing *Kernan v. Kurz-Hastings, Inc.*, 175 F.3d 236, 444 (2d Cir. 1999)), whether the theory could be applied to a patent infringement case, *id.* (citing *Max Daetwyler Corp. v. Meyer*, 762 F.2d 290, 299 n.12 (3d Cir. 1985)), or whether the theory applies to a nonresident defendant who grants a royalty-bearing license for intellectual

property that is developed, marketed, and sold in the United States. Resp. Opp. at 16 (citing *Purdue Research Found. v. Sanofi-Synthelabo, S.A.*, 338 F.3d 773 (7th Cir. 2003)). The confusion evident in these cases justifies further why this Court should grant the Petition.

Although NTW takes the view that Petitioners seek to appoint record albums as agents for service of process, this Court previously observed that personal jurisdiction may be asserted where the defendant's conduct "is not simply an isolated occurrence, but arises from . . . efforts . . . to serve, directly or indirectly, the market for its product in other States[.]" *World-Wide Volkswagen*, 444 U.S. at 297-98. *World-Wide Volkswagen* and *Burger King* remain controlling, and the stream of commerce doctrine should be applied in this music copyright case to hold that the Tennessee federal court had personal jurisdiction over NTW, based on the evidence Petitioners presented below. *See Dehmlow v. Austin Fireworks*, 963 F.2d 941, 946-48 (7th Cir. 1992) ("Because the Supreme Court established the stream of commerce theory, and a majority of the Court has not yet rejected it, we consider that theory to be determinative."); *Triple A Partnership*, 629 F. Supp. at 1524.

CONCLUSION

This Court has an opportunity to clarify personal jurisdiction analysis and to elucidate its application within copyright law. For all of the reasons stated, the Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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